IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

(JUDGES GRIBBS, KELLY, AND SAWYER)

MARCIA SNIECINSKI,

Plaintiff-Appellee,

v.

BLUE CROSS AND BLUE SHIELD OF MICHIGAN.

Defendant-Appellant.

Supreme Court No. 119407

Court of Appeals No. 212788 C

Wayne Circuit No. 96-616254-CZ
(Hon. Marianne O. Battani)

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

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Defendant-Appellant Answers "Yes"

Plaintiff-Appellee Answers "No"

Court of Appeals Answers "No"

2. WHETHER THE DEFENDANT'S FAILURE TO PLEAD THE AFFIRMATIVE DEFENSE OF FAILURE TO MITIGATE DAMAGES IN ITS FIRST RESPONSIVE PLEADING, AS IS REQUIRED BY MICHIGAN COURT RULE 2.11(F)(3), WAIVED THE DEFENSE?

Defendant-Appellant Answers "No"

Plaintiff-Appellee Answers "Yes"

Court of Appeals Answers "Did Not Directly Address"

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Defendant-Appellant Answers "Does Not Address"

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Court of Appeals Answers "Yes"

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Defendant-Appellant Answers "No"

Plaintiff-Appellee Answers "Yes"

Court of Appeals Answers "Yes"

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Defendant-Appellant Answers "Yes"

Plaintiff-Appellee Answers "No"

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Defendant-Appellant Answers "Does Not Address"

Plaintiff-Appellee Answers "Yes"

Court of Appeals Answers "Did Not Address"

I.

STATEMENT OF MATERIAL PROCEEDINGS BELOW

Plaintiff filed a one-count complaint alleging that the Defendant failed to hire her, in part, due to her gender/pregnancy in violation of the Elliott-Larsen Civil Rights Act. [1a-6a]. Defendant answered the Complaint, denied the allegations therein, and, **critically**, failed to allege in its first responsive pleading the affirmative defense of failure to mitigate damages. [7-11a]. Plaintiff later filed an Amended Complaint that was essentially the same as the original complaint except it now included a claim for breach of contract with distinguishing features[20-29a]. At this point, over one and one-half years from the date the Complaint was filed, the Defendant filed an Amended Answer, and in this new Answer asserted, for the first time, the affirmative defense of failure to mitigate. [30-40a]. Plaintiff then voluntarily withdrew her amended complaint, eliminating her contract claim, and reverted to her initial pleading. [See Proceedings March 23, 1998 57a, 61a]. Defendant never amended its initial responsive pleading, nor did it ever seek leave of the count to include an affirmative defense that did not comport with the Michigan Court Rule requirement that an affirmative defense be set forth in the party's first responsive pleading.

Prior to trial Plaintiff-Appellee filed a Motion in *Limine*/Answer to Defendant's Motion in *Limine*. attempting to prohibit the Defendant from arguing the issue of mitigation to the jury. Plaintiff extensively briefed its claim that the Defendant had waived the affirmative defense by not properly pleading it. [1b, 4-7b].

A Hearing was held on the Motions in *Limine* and the Plaintiff again argued that the Defendant's failure to plead mitigation as an affirmative defense in the first responsive pleading

waived the defense. [63a]. The trial court did not, contrary to the appropriate court rule, prohibit the Defendant from arguing to the jury that the Plaintiff had failed to mitigate her damages.

A seven-person jury was impaneled. The jury was unusual in the respect that it was very educated and professional. The panel included a physician who was married to a physician [110b-112b] a systems analyst for IBM Global Services [98b] a wire transfer agent from a well known bank and a sergeant in the Lincoln Park Fire Department. [117b-119b]

Trial proceeded from March 24, 1998 through March 30, 1998. On March 30, 1998, the seven-person jury unanimously concluded that The Defendant failed to hire the Plaintiff. [380b-383b]. The jury unanimously concluded that pregnancy was a motive or reason in Defendant ***not hiring*** the Plaintiff and that the Plaintiff suffered $125,000 in past economic losses, $136,000.00 in future economic losses and $90,000.00 for emotional distress. [Id]. A Judgment consistent with the jury verdict was then entered. [42-43a]. The Circuit Court retained jurisdiction to award all costs and attorneys fees. [Id].

Defendant then filed a Motion for New Trial, JNOV and Remittitur. In regard to the remittitur issue the Plaintiff reasserted her claim that the Defendant had failed to properly plead the affirmative defense of failure to mitigate damages. [61b-62b]. A Hearing was held on May 29, 1998 and the trial court, with the benefit of viewing all of the witnesses, their credibility and testimony, denied the Defendant's Motions in every respect. [70b-84b]. An Order was entered in accordance with the ruling from the bench. [44-45a].

Defendant timely appealed. The Court of Appeals unanimously concluded that the Defendant was not entitled to a JNOV and/or New Trial. [46a]. The panel uniformly agreed that there was a plethora of evidence that supported the jury's verdict. [46-50a]. The Court of Appeals also held, in a 2-1 decision, that there was ample evidence to support the Plaintiff's

claims for emotional distress damage. The court, in a footnote, held that the Plaintiff had waived her claim that the Defendant failed to properly plead the affirmative defense of mitigation by failing to file a cross-claim. [50a]. It is the Plaintiff's contention that finding is erroneous for the reasons set forth within.

Defendant filed a Motion for Rehearing and the Motion was Denied. [53a]. Defendant then filed an Application for Leave to Appeal with this Court. Leave was then granted on April 30, 2002. [54a].

The **appropriate standard of review** is whether the Trial Court abused its discretion in denying Defendant's motion for new trial, JNOV and/ or Remittur. The relevant authority is supplied within each argument.

II.
COUNTER-STATEMENT OF FACTS

Plaintiff Marcia Sniecinski, after graduation from high school, began working for Group Health Services (GHS) in 1983. [115a]. GHS was a predecessor of Blue Care Network of Eastern Michigan [BCNEM]. The evidence at trial further demonstrated that BCNEM, at all relevant times, was a wholly owned subsidiary of Defendant Blue Cross Blue Shield of Michigan [BCBSM]. [130b,187b, 298a, 120a]. Relative to the subject matter of this litigation, the evidence demonstrated that BCBSM controlled and made all relevant decisions regarding the unification of the marketing departments of BCBSM and BCNEM in 1993. [248-249b],

From 1983 through 1989 plaintiff performed a number of different positions within GHS. [115-117a]. In each she learned more about health maintenance organizations (HMO's). In 1987 she became a telemarketing representative. In that capacity she would sell HMO insurance over the phone. She developed substantial relationships with individuals in the insurance industry including brokers, agents, and the like. [115-119a].

In 1989 GHS merged with BCNEM. At that time BCNEM honored all of the seniority that the Plaintiff had acquired at GHS. Therefore, she had a seniority date going back to 1983 with BCNEM as a result of this merger. [119-120a].

At all relevant times hereto BCNEM was a wholly owned subsidiary of the Defendant BCBSM. [187b, 298a, 120a]. The CEO of BCNEM, Arnie Duford, was an employee of BCBSM. The Board members of BCNEM were employees of BCBSM. The supervisors for critical employees of BCNEM, such as the head of Human Resources, Pat Stone, were all employees of BCBSM. [411-412a].

During the course of her employment with BCNEM Plaintiff was evaluated on an annual basis. In each and every instance she received excellent evaluations. Trial Exhibits 3-6 represent evaluations for the years 90, 91, 92, and up to 6-15-93. During these years the Plaintiff was awarded Telemarketing Representative of the year and was nominated for the Vice President's Club for selling over 105% of quota. Indeed, some of the figures were spectacular. For example, in Exhibit 4, which is for the review ending 8-1-92, the Plaintiff exceeded quota by 300%. Exhibit 3, for the year ended 6-15-93, showed that the Plaintiff exceeded her goal by 242%. [120-123a, 387b-410b also see testimony of Curdy 168-169b].

In 1992 BCBSM unilaterally determined it would merge the departments of BCNEM & BCBSM.[1] The evidence clearly demonstrated that the decision to merge the companies was

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[1] Specifically, counsel for Defendant-Appellant admitted it. Mr. Feinbaum stated in his Opening Statement that, "[s]o a decision was made by Blue Cross in early 1993 to merge these two departments. Plaintiff at the time worked for BCNEM'. [Defendant's Opening excerpts 125b]. Kathryn Elston, Vice President of Marketing for BCBSM admitted at her deposition, that was re-read to the jury during her cross-examination, that back in 1992 BCBSM first determined that it wanted to merge the departments. [247b-248b]. Elston further testified that there was not a written proposal sent to BCNEM. In drafting the document on how to merge the departments BCNEM was not even consulted. Rather, BCBSM hired a consultant to effectuate the merger of the respective departments. [247b-249b]. Specifically, Ms. Elston agreed that, "Blue Cross had

made exclusively by BCBSM. The evidence further established that BCBSM decided how to merge the companies, made the decision when to merge the companies, and decided what BCNEM employees would be placed in specific positions. BCBSM decided how the Plaintiff was to be treated at every level. Finally, all employees of BCNEM all reported to superiors and direct supervisors at BCBSM. [See Opening Statement/Admission of Defendant's attorney 125b, See Kathryn Elston, Vice President of Marketing for BCBSM, 247b-251b, and Also See testimony of Donald Roseberry Sales Team Manager for BCBSM 139b-142b, 165b]. Indeed, the CEO of BCNEM, Arnie Duford, was an employee of BCBSM and reported directly to individuals at BCBSM. [Testimony of Patricia Stone 411-412a]. Specifically, Ms. Stone[2] testified on cross-examination at trial as follows:

"Q. And the person you reported to at the relevant times in this case was Joel Gibson.[3] Is that true?
A. That's correct.
Q. And Joel Gibson is an employee of Blue Cross Blue Shield. Is that true?
A. Joel was one of the persons that I reported to.
Q. In your deposition was Joel the only person you mentioned, if you remember?
A. I don't really know. I had a dotted line at that time to, I believe, either Arnie Duford or Jim McFarlane as well, someone on the local level.
Q. Arnie Duford was the CEO of Blue Care Network. Is that true?

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an idea of what unification should take place and had a general plan and it was Mr. Whitford's job to put it in place". [249b]. At the time Ms. Elston selected Mr. Whitford all jobs were already allotted for the merger of the marketing departments of BCNEM with BCBSM. [246b-250b]. She further explained that any Medicare hiring freeze that subsequently was put in place applied only to new hires. [251b]. It is not disputed that each and every person from BCNEM who was merged into BCBSM was not technically a new hire. Rather, each person maintained his or her seniority all of the way back to his or her BCNEM seniority date. [130b-131b]. In the Plaintiff's case that would have gone back to 1983, her time at GHS. Therefore, at the time that the Plaintiff should have been merged into BCBSM she would have had over a decade of

A. That's true.
Q. And do you know if at a time he was also in that capacity, an employee of Blue Cross Blue Shield?
A. Yes.
Q. Okay. So the CEO of Blue Care Network was an employee of Blue Cross Blue Shield, and the person you reported to, Joel Gibson was an employee of Blue Cross Blue Shield. Those are both correct statements. Is that true?
A. That's true.
[Pat Stone411-421a]..

There was also extensive evidence that established that the Plaintiff had numerous problem pregnancies between 1989-1994. This was, essentially the period after GHS merged with BCNEM. The first such problem pregnancy occurred in 1989. It was with the Plaintiff's daughter Janae. She had premature bleeding and dilation. She was forced off work from April 1989 through November 24, 1989. [124-125a]. The evidence showed that Plaintiff desperately wanted to resume her career and returned to work and did a great job. Indeed, notwithstanding all of the pregnancy complications the Plaintiff continued to exceed all of her production quotas by very wide margins. Plaintiff desired to be an effective mother, a good wife and a great employee. The evidence showed that she accomplished all of these goals. [124-125a]. Plaintiff had a second problem pregnancy in 1992. As a result she had a miscarriage in early 1993 [126a].

Her supervisor at this time was Michael Curdy. Mr. Curdy, the evidence demonstrated, had a problem with the Plaintiff's pregnancy leaves. The same Mr. Curdy who, at all relevant times hereto, was a decision-maker for the Defendant Blue Cross Blue Shield. [Whitford pp. 360-361a]. Mr. Curdy was the man who provided virtually all information regarding the plaintiff to the ultimate decision-maker for the project, Don Whitford. [[Id]. Whitford admitted, as a team manager, he would have talked with Curdy daily. [101b-102b; *also see* 145b, 190b]. **Mr. Curdy did not disagree with the characterization that Curdy was the eyes, ears and nose of Mr. Whitford regarding evaluation of the employees that were coming from BCNEM**. [Tr. 189b-190b]. Mr. Curdy explained that it would be expected as he "had the most experience in working with them". [Id]. Mr. Curdy explained that he would give his **frank opinion** regarding every individual, including the Plaintiff, who was at BCNEM to Mr. Whitford [190b].

Ms. Sniecinski testified, " he [Curdy] definitely had a problem with me being pregnant". He was very discriminative [127a]. There was an occasion in Flint when the Plaintiff was advising individuals that she was pregnant and Mr. Curdy stated that he was not going to let anyone sit in that chair anymore because it was the "pregnancy chair". [128a]. This was witnessed by Debbie Beyer. [129a]. Curdy further explained to the Plaintiff that, notwithstanding the fact that she had time to take off if she needed to do so, he was not going to allow her to use sick time for the pregnancy. [128a]. He asked her if she was going to have problems like she had in 1989. [130a]. After the miscarriage Plaintiff was advised by Renee Cole, Mr. Curdy's secretary, that he forbade her from sending flowers. [Id]. Furthermore, after the miscarriage Mr. Curdy affirmatively raised and discussed with the Plaintiff the possibility of future complications in other pregnancies. [131a].

Mr. Curdy tried to have the Plaintiff written up. Plaintiff complained to Patricia Stone. Ultimately the memo that was put into the Plaintiff's file by Mr. Curdy was removed. [129a].

Mr. Curdy made other relevant statements and took other affirmative actions that showed his animus towards the Plaintiff because of her pregnancy complications.[4] First, almost immediately after Mr. Curdy found out that Plaintiff was pregnant in September, 1993, he made a statement to her that he should not hire fertile women or women in child bearing years. [260-261a]. Second, immediately after that statement was made, Mr. Curdy and his BCBSM supervisor, Don Whitford, proceeded to attempt to **sabotage** the Plaintiff's file with BCNEM. [See Exhibit 55 Franklin Planner notes of Pat Stone "**all had thoughts of Mike sabotaging**" as well as other notations from the Franklin Planner. See specifically notations for Sept 10, 1993 and September 16, wherein **Don W wants threat in her file after she is off on pregnancy leav**e. [Emphasis added 581b-593b *Also please see infra*].[5] These acts are taken within days of Curdy and Whitford finding out that the Plaintiff was, again, pregnant.

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[4] Mr. Curdy's wife had not worked out of the house since they had children. [167b].

[5] Notwithstanding all of the statements made by Curdy, the sabotaging of the Plaintiff's personnel file by Curdy and Whitford as soon as they found out Plaintiff was pregnant again, including but not limited to trying to put threats in her file, trying to write her up

A. The Unification of the Marketing Departments of BCNEM & BCBSM.

The Blue Cross and Blue Care Network Sales Effectiveness Project, written by Ms. Elston and other Blue Cross Executives, was dated April 14, 1993. [443b-449b]. It was known and decided by BCBSM in 1992 that the departments would be merged. [247b-250b].

To effectuate that goal Ms. Elston appointed Donald Whitford as the Regional Director to unify the Flint and Saginaw Sales Departments. [250b]. In a July 12, 1993 letter, the first formal letter sent to employees of the respective departments, Mr. Whitford informed them that they needed to fill out position application forms so that the individual employees could be placed. [Trial Exhibit 9, 421b]. It is clear that no employee was to lose his or her position. [Id]. Indeed, the testimony of at least four different BCBSM employees or witnesses all corroborated that there would be no loss of positions with the unification. Plaintiff testified that she was specifically told at the marketing meetings that no positions would be lost, that it was the intention of BCBSM to transfer all employees. [132a]. Specifically, the Plaintiff testified that "[i]n the marketing meetings they made it very clear to us that none of the positions would be lost; that it was their intention to transfer everybody over. [Id]. She was told by Donald Roseberry[6] that all jobs were going to transfer. [135a-136a]. Mr. Roseberry admitted this on his cross-examination. The exact questioning went as follows:

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and discipline her for a prior miscarriage that had occurred nine (9) months previously in January 1993, countless conference calls regarding Plaintiff immediately after she went off on leave, and ultimately the fact that because of Curdy/Whitford the Plaintiff-Appellant was the only person not to transfer to her account representative position at BCBSM despite the fact that she was one of the best performers, the Defendant had the audacity to put in their Application, "Neither plaintiff nor any other witness was able to describe even one example of Mr. Curdy taking negative action against Plaintiff for any reason, much less her pregnancy, at any time. [See Defendant-Appellant's Application Brief p. 3]. The statement ignores the facts as does essentially in the Defendant's appeal brief. Defendant would lead this Court to believe that no evidence supported the jury's decision by just ignoring the evidence. That is what the Defendant does as it fails to present a brief that comports with the Michigan Court Rules. That is, the Defendant did not submit a brief that presented all material facts both favorable and unfavorable. [See MCR 7.212(C)(6) and &.306(A).

[6]Mr. Rosemary was the Regional Sales Manager for the Saginaw office of BCNEM. After the unification he maintained essentially the same position at Defendant BCBSM.

"Q. Is it true Mr. Roseberry that every single person **regardless of the quality of their work** came across in the unification?

"A. That was part of the process. Yes.[7]
[140b].

Indeed, as Ms. Elston testified, there was an expected synergy between the two departments and, it was believed that actually more employees would be hired. That is, in fact, what occurred. For everyone, except the Plaintiff herein[8]. [249b-250b].

Exhibit 9 (421b) was important not only to show that the selection process was merely an exercise at "placement" of individual employees. It also demonstrated that Mr. Curdy was already representing BCBSM even though he was an employee, technically, of BCNEM. That is, he was being paid by BCNEM but working exclusively at the instruction of Mr. Whitford on behalf of BCBSM. It was the testimony of Mr. Whitford and Mr. Curdy that they worked together on the sales effectiveness project during this period of time. They worked in Flint together. They talked on a daily basis. [190b]. Mr., Curdy testified that long before unification took place he was acting like an employee of BCBSM. In addition, it was agreed that in the unification process he was a decision-maker. [197b-202b]. This observation was shared by Mr.

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[7]Likewise Mr. Curdy testified that "We were told nobody would lose their job" [194b-196b]. Defendant never explained to the jury how and/or why the Plaintiff was not returned to her position consistent with the policy at both BCNEM and BCBSM. First Defendant used the pretext that there was a Medicaid Hiring Freeze. However, when it appeared that this pretext could never be defended the Defendant shifted to a new reason at the time of trial. The new pretext was that there was a "window of opportunity" that Plaintiff missed. Something that was never recorded, reduced to writing, and or in anyway communicated to the Plaintiff.

[8] Defendant has repeatedly argued that this was not a transfer [See Defendant's Application for Leave to Appeal p. 4 fn1]. This is again nothing more than the Defendant trying to re-write history. Whitford's letter Exhibit 9, demonstrated that the unification process was to place BCNEM employees in positions at BCBSM. [421b] As Roseberry testified this was regardless of the quality of work. [140b]. Elston and Curdy concluded that no one was to lose their job. [195b-196b] Most critically Defendant's own document, Exhibit 32, stated that BCNEM employees would be "**transferred to BCBSM effective 9-25-93 [barring any work stoppage]**. The process was a transfer for each and every member of the BCNEM marketing team with the sole and exclusive exception being the Plaintiff-Appellee Marcia Sniecinski. [Emphasis added] [455b].

Whitford who also testified that it was a tri-partite decision made by himself, Roseberry and Mr. Curdy. [227-228b]. Exhibit 9 showed that the placement applications were to go to Mr. Curdy. Mr. Curdy needed no special permission to perform essentially all of his work for the sales effectiveness project for BCBSM while he was on the payroll of BCNEM. **As he explained, BCBSM and BCNEM were "run as one".** [196b-199b][Emphasis added].

B. The Application and Interview Process.

Plaintiff timely filed her position application (Exhibit 45) with Mr. Curdy as instructed in Exhibit 9.[470b, 421b]. Unlike other employees the Plaintiff specified only one position, that of account representative. The account representative position was her long-time goal. [133a].

It is also important to note that the Plaintiff was not interested in an account representative position in Flint, Michigan, because it was 50 miles from her home. [133a-134a.]. Within the application it confirms that the Plaintiff was an excellent employee and a winner of many sales honors and awards. Indeed, her interview evaluation by Mr. Whitford demonstrated that she was well qualified for the job and out of six account representative positions she graded out as tied for second best qualified. [Trial Exhibits 26 & 44][450b, 469b].

The evidence further established that by the end of July 1993 the Plaintiff had already been selected to be an account representative for the Saginaw Tuscola area. Exhibit 10 was the Blue Cross interoffice memo from Roseberry to distribution. The Plaintiff's name was already hand written [9]in for that territory. The transfer, prior to pregnancy, was in place. [422b].

Exhibit 32 also showed that the transfer of individuals was a formality. It started with a list of names and stated: "The following BCN-East employees will be transferred to BCBSM effective 9-25-93 (barring any work stoppage) in the positions indicated:...[Exhibit 32] 455b[10].

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[9] Plaintiff's maiden name was Marcia Jacobs.

[10]There was subsequently a strike at BCBSM that delayed the unification of the marketing departments until November 22, 1993. The date of the unification was never relayed to the Plaintiff. Plaintiff was the only person who was not transferred over at that time. Plaintiff testified that had she been apprised or called she could have easily gone over to do the paper work. It was the decision of the Defendant BCBSM to keep her on at BCNEM and not transfer her over to BCBSM because of her pregnancy.

The final step of the placement process was an interview. It was the job of the three men to place the employees. The three men who were making the ultimate decisions were Mr. Whitford, Roseberry and Curdy.

C. The Statements Made at the End of the Interview.

At the end of the Plaintiff's perfunctory interview[11] with BCBSM, as the Plaintiff was going to leave, Mr. Curdy asked her to have a seat. He stated that she had had problem pregnancies in the past and asked if she thought it would be a problem in the future. [137a-138a]. Plaintiff testified that she was very upset, livid and crying. Plaintiff immediately went to Pat Stone, who was the Human Resource Director at BCNEM. [138a-139a]. Stone advised the Plaintiff that Curdy's actions were inappropriate.[12] [139a].

At a second interview, held only with Don Roseberry and Don Whitford, the Plaintiff was offered the job. The Plaintiff accepted. [139a-141a]. They told her welcome aboard. [139a]. Furthermore, Masseurs Whitford and Roseberry advised the Plaintiff that the all jobs would be transferred over to the BCBSM payroll as soon as the unification took place. However, Whitford and Roseberry did not know the date of the unification at that time. [143a]. They advised that

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[11]The interview was perfunctory because, as was previously explained, each and every person from both BCBSM and BCNEM were all guaranteed a position. As everyone testified no one would lose his or her position. Indeed, new positions were generated. Moreover, even if a person was not selected for one of their first three choices, they were still given a position with BCBSM. The Plaintiff, because of her pregnancy, was the only individual who lost her position. In addition, contrary to the Defendant's claim that there were no comparables there were many. Each person who was not out on a pregnancy leave got their position at BCBSM. Moreover, Exhibit 49, which was the Defendant's third set of interrogatory answers demonstrates that there were approximately 89 individuals who went out on long term disability at Defendant BCBSM. Each one of those individuals were returned to their position after their disability. None lost their jobs. In addition, at least four of those individuals were returned to different positions when there was an alleged Medicare hiring freeze. See, Exhibit 49 and the attachments [500b-510b].

[12]It should be remembered that Curdy, though on the payroll of BCNEM, was clearly working at the direction of, and on behalf of, BCBSM. As he testified both entities were treated as one. It should also be pointed out that the Plaintiff had not signed any type of medical release for personal medical information to be released by BCNEM.

all seniority would also transfer.[13] [143a]. This would give the Plaintiff a BCBSM seniority date of 1983, the date that the Plaintiff had originally started with GHS. [Id].

Between the time of the first interview and the offer, however, Plaintiff found out that she was again pregnant.. It was only after the Defendant offered the Plaintiff the job, and she accepted, that she told Whitford and Roseberry that she was pregnant. [141a].

Because of all of the difficulties that she had with Mr. Curdy in the past, the Plaintiff specifically asked Don Roseberry and Don Whitford not to tell Mr. Curdy of her pregnancy. [142a]. Almost immediately thereafter, however, the news was out that she was pregnant. Plaintiff had not told anyone else other than Don Roseberry and Don Whitford. **After Curdy found out that the Plaintiff was again pregnant, he made the comment to her that "I will have to make sure I don't hire anybody in child bearing years."** [198a, 200a, **260a-261a].**[14] He also expressed concern that she would have problems in the future. [200a-201a].

Plaintiff testified that the job meant a great deal to her. She started at the bottom and worked her way all the way up. It was what she had worked hard for ten years to accomplish. [144a]. She felt great when she got the job. It was a huge accomplishment. [143a]. The job meant a huge raise in income. She was supposed to go from making approximately $22,000.00 a year to well over $40,000.00 plus a variety of fringe benefits. [144a]. Significantly, the job still was, essentially, an 8:30 -5:00 job. It allowed the Plaintiff to be a good mother and wife and still make a very substantial income. [145a]. There was great job security. There was little risk of getting fired. [Id]. Indeed, Mr. Curdy testified that it was almost impossible to fire people so the best way to get rid of people was to not hire them.[15] Evidence of the job security at

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[13]Obviously these individuals were not considered new hires and were not effected in the least by any alleged Medicare hiring freeze. Indeed, Whitford testified that these positions were allocated and approved back in 1992 and early 1993.

[14] He ultimately made good on this promise by ensuring that the Plaintiff was not given a position at BCBSM.

[15] Mr. Curdy testified that BCBSM had progressive discipline. You didn't just terminate someone. Curdy explained that even if someone was violent or committed a theft that one still had to go through HR to terminate them. Mr. Curdy lamented that it was not easy to fire someone. At trial, counsel for the Plaintiff reiterated a line of questioning from Mr. Curdy's

BCBSM, and the desirability of the account representative position, is the fact that at the time of trial, a period of five years, not one person had been termianted nor had anyone quit. [146a].

D. Plaintiff's Pregnancy Complications and the Defendant's Intentional Decision to Exclude the Plaintiff from the Group of BCNEM Marketing Employees who were Transferred to the Payroll of BCBSM on the Date of the Unification.

In September 1993 the Plaintiff, unfortunately, again had pregnancy complications. [146a]. Plaintiff went off on sick leave in September 1993. She contacted all three men, Whitford, Roseberry and Curdy. Initially she went off just on sick leave. It was not known, or intended, that the Plaintiff would be off for an extended period of time. However, ultimately she was put off until after the birth of her child in April 1994. [147a].

While Plaintiff was off on pregnancy leave she made a number of phone calls to Masseurs Curdy, Roseberry & Whitford. Curdy & Whitford never returned a single call of the Plaintiff's. [147a-149a]. [Plaintiff did, however, personally make contact with Roseberry.

Plaintiff asked Roseberry to send her literature so that she stay informed. Roseberry told her, "not to worry about it.. Stay home, take care of yourself". [148a]. He further informed her that he would keep her informed and not to worry about anything. [Id].

Contrary to Roseberry's promises, no one from BCBSM ever called the Plaintiff to tell her when the unification took place. [148a]]. No one returned calls, including Whitford, notwithstanding the fact that the Plaintiff had left many messages. [149a, 258a].

Had any of the three gentlemen advised Ms. Sniecinski when the unification took place, she could have come in to sign the papers completing the transfer from BCNEM to the BCBSM payroll. [256a-257a]. Mrs. Sniecinski was not bed-ridden and if they would have called her to fill out some papers, she would have been there that day. [148a-149a, 256a-258a].). Plaintiff was the only BCNEM marketing employee who was not transferred/hired over to Blue Cross

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deposition and concluded by asking Mr. Curdy if he agreed that the most effective way of terminating someone would be just to never hire them. Mr. Curdy agreed. [206b]. That is exactly what Curdy did to the Plaintiff in the instant case. He terminated her by making sure that she was not transfered/hired by BCBSM

Blue Shield on the date of the unification.[16] She was, obviously, the only person not informed of the unification despite her repeated inquiries. [148a].

Bill Toples was the individual at BCBSM who was responsible for processing the paperwork that transferred one employee from BCNEM to BCBSM. In regard to this case he did so at the direction of Don Whitford. Mr. Toples testified that if Plaintiff had been sent over with the other BCNEM employees he would have transferred/hired her just as he did with all others.

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[16] Donald Roseberry, one of the BCBSM Team Leaders testified as follows:

> "Q. Is it true, Mr. Roseberry that every single person regardless of the quality of their work came across in the unification?
> "A. That was part of the process. Yes.
> [140b]

Roseberry added that it was a foregone conclusion that the forces of both marketing departments were going to be merged and that Blue Care Network workers were being transferred to Blue Cross. [140b-141b].

This was echoed by all high ranking BCBSM officials. Donald Whitford testified as follows:
"Q. Now you testified sir that her job, the telemarketing position , did not transfer over, is that correct?
"A. Those particular functions did not. That's correct.
"Q. But all the people transferred over. They all got new positions. True?
"A. The people transferred over in new positions. That's correct.
[222b].
All transferred over, except the Plaintiff. Whitford later testified every person other than the plaintiff, with the exception of one person who resigned from the marketing department of BCNEM, transferred over to BCBSM. [225b].

Finally, Mr. Curdy testified on this issue that he was advised that there was a merger of BCNEM employees into BCBSM. That he was placing these employees into positions. **That nobody would lose their job**. That all seniority would transfer. [194b]. Mr. Curdy concluded with the following colloquy:
"Q. And do you remember, sir, that in planning the unification in the merger that Blue Cross took for a base number of employees all the individuals in the Marketing Department of Blue Care Network and all the individuals in Blue Cross, and that's how they determined the number of employees that were going to be used?
"A. Yes
"Q. And that way it was guaranteed that no jobs would be lost. Is that true?
"A. That is what we were told.
[195b-196b]. [Emphasis added].

It was a ministerial job. [449a-452a]. Therefore, on that day each and every employee of BCNEM was transferred to and/or hired by BCBSM except Marcia Sniecinski.

Plaintiff's son was born on 4/9/94. No one from BCBSM or BCNEM ever told the Plaintiff that if she did not return prior to a special date that she would not be hired or that she would lose her job. No one ever told her that there was a "window of opportunity" to accept the job. Indeed, she had accepted the job. No one advised her that there was a window in which she had to report. They led her to believe that her time off was not a problem. No one ever told her about a Medicare hiring freeze as a reason that she could not be hired. [149a-153a].

Plaintiff was placed on LTD officially on March 1, 1994. The decision to keep her on the books of BCNEM, however, during the duration of her pregnancy was a decision that was made exclusively by Defendant BCBSM, the parent of BCNEM.[17] [Vol. IA 44-45]. The Plaintiff, who was pregnant, was the only person to remain on the books of BCNEM. [152a-154a].

Plaintiff asked specifically how she would be treated while she was off on pregnancy leave and how she would be transferred to BCBSM payroll. She was advised that she was being kept on BCNEM' s books until she came back to work and then she would be immediately transferred over. [154a].

E. Under the Long Term Disability of Both BCNEM and BCBSM the Plaintiff was Entitled, After her Pregnancy Leave Expired, to the Position that she was Offered and that she Accepted at BCBSM.

Plaintiff became aware of what the LTD policy was at both BCBSM & BCNEM. The policy is put forth in Exhibit 15. Paragraph 17 of that Exhibit states:

> **"If the returning employee[s] most recent position is open, he/she will be reinstated to that position"**
>
> Trial Exhibit 15 ¶17 [emphasis added] [438b]

[17] The long-term disability plans of BCBSM and BCNEM were identical. See and compare Trial Exhibits 14, 15, and 56 [433b-440b, 594b].

The evidence also showed that this was the same guideline that was in place at BCNEM. The evidence also demonstrated that BCBSM was the facilitator for both plans. [150-151a].

Pat Stone, the HR Manager for BCNEM, initially testified that she was not sure, or was not necessarily bound by the BCBSM policy found in Exhibit 15. [436b-440b]. Ms. Stone claimed that was true even though both policies were administered by the same administrator BCBSM. [296b-298b].[18] Stone was then confronted with Exhibit 56, which is a letter that the Plaintiff was sent by BCNEM after she sought her job after her pregnancy leave was over. Exhibit 56 is identical to the policy that was used by BCBSM. Ms. Stone ultimately admitted that the LTD policies for BCNEM & BCBSM were identical. [296b-298b *also see* 263a].

The evidence shows that the Plaintiff's position as an account representative was open when she attempted to return to work. **It was never filled prior to May 26, 1994**. [151a also . see Trial Exhibit 31, 454b]. Therefore, under the Defendant's LTD Policy, and the policy of BCNEM, the Plaintiff should have been placed into the position. [19]

On May 20, 1994, Plaintiff called Pat Stone to see what she had to do procedurally to start her job at BCBSM. It was the Plaintiff's testimony that Stone told her, "didn't anyone tell you...you have no position anymore it has been eliminated." [154a-155a].

Neither Pat Stone, nor anyone from BCBSM, ever told Plaintiff that if she went out on LTD her job would not be available to her when she returned. She received no letters, documents, faxes or anything else that would have informed her of this. [152-153a].

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[18]Interestingly, Ms. Stone, a BCNEM employee and head of Human Relations, was the representative of the Defendant BCBSM in at least five depositions. Each and every superior that Ms. Stone reported to was an employee of the Defendant BCBSM,

[19] Apparently desperate the Defendant-Appellant now, for the first time, cites portions of ERISA. [See Defendant's Brief p.10 fn 4]. Defendant cites ERISA for the proposition that they had no discretion to change the plan. Plaintiff did not require for the Plan to be changed. BCBSM could not, however, decide to not hire or transfer the Plaintiff because she was pregnant or had a history of pregnancy complications. Finally, this is a new issue first raised in this Court. It was never raised, never argued, never briefed, and never preserved. *See Mitchum v City of Detroit* 355 Mich 182, 94 NW2d 388 (1959) , *Wortman v. R. L. Coolseat Construction Co., 305 Mich. 176, 9 N.W.2d 50.*

Plaintiff knew that her job was open and had not been eliminated. Exhibit 39 demonstrated an interoffice memo that stated:

> "As a follow-up to our recent conversation on handling Marcia's groups in her absence please reference the attached temporary assignments. Each page notes who will handle calls during Marcia's absence. When Marcia returns all of these calls should be directed to Marcia until other arrangements are made.
> Exhibit 39 [468b]..

Exhibit 12 was a schematic that identified the job as the Plaintiff's as of 12/9/93. [424b]. Exhibit 11 was a fax dated 12/20/93 that identified the area as the Plaintiff's. [423b]. Finally, Exhibit 31 showed the territory that was the Plaintiff's as "**OPEN**" as of March 31, 1994. [454b]. This position was not filled prior to the plaintiff's attempt to return to work on May 26, 1994.

When Plaintiff called Pat Stone regarding her job, Ms. Stone did not indicate that they could not put her back in the job because of some Medicare hiring freezes. [155a-156a]. Rather, she was advised by Pat Stone that there was no position for her. [20] However, Stone's Franklin Planner notes demonstrate that she called Joel Gibson to inquire whether a position was available. [See Exhibit 55 notation May 25 1994][592b].

In light of the fact that Mr. Roseberry advised her not to worry about her job, to take care of her baby, she felt she had been set up. [157a). Consequently, she had no reason to call any of the three gentlemen decision-makers Curdy, Roseberry or Whitford. They did not return her calls during the time that she was off. Moreover, Plaintiff had, in the past, complained directly to Mr. Whitford regarding Mr. Curdy. Plaintiff was told by Mr. Whitford that he would talk to

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[20] Defendant contends in a footnote that Stone told Plaintiff back in October 1993 that if she went on LTD she lost the right to the BCBSM job. [Defendant's Brief p. 9 fn. 3]. Plaintiff denied this statement and the jury obviously didn't believe Stone, a person who had been repeatedly discredited and impeached. This statement in the Defendant's brief could not possibly be true for a plethora of reasons. Initially, Stone never testified that when the Plaintiff called her back that she told her this before. Moreover, if Stone told her this before why would Stone have been surprised? Most critically, if Stone really had told Plaintiff this, why was she inquiring if the Plaintiff's job was available? Stone was a person who repeatedly lied and was repeatedly impeached. Her demeanor and veracity was fairly judged by the fact-finder.

Curdy. Based upon the Plaintiff's best information and belief, Mr. Whitford never talked to Mr. Curdy and never disciplined him. [157a-158a].

F. Pat Stone's Franklin Planner, Confirmation That Curdy and Whitford Sabotaged the Plaintiff's Efforts to Work for BCBSM Because of Pregnancy.

Mrs. Stone has been a HR Resource person since 1985. [263b]. She was the highest ranking HR person at Blue Care Network. She was the Big Kahuna. The person she directly reported to was Joel Gibson. Mr. Gibson was an employee of BCBSM and was the head of HR for BCBSM. [264b]. Ms. Stone also explained that she reported to Ernie DuFord. Mr. DuFord is the CEO of Blue Care Network. He was also an employee of Blue Cross Blue Shield. [265b].

> "Q. So the CEO of Blue Care Network was an employee of Blue Cross Blue Shield and the person you reported to, Joel Gibson, was an employee of Blue Cross Blue Shield. Those are both correct statements. Is that true?
> "A. That is true." [265b].

Stone knew her Franklin Planner could be an issue in litigation. She went through and provided Plaintiff's counsel the pages. She did not allow the Plaintiff to actually inspect her Franklin Planner under the claim of privacy and privilege. She confirmed, however, that the entries in her Franklin Planner were not always contemporaneous. [265b-268b].

On direct examination by Mr. Feinbaum, Ms. Stone stated that she was not aware of any complaints regarding any statements made by Mr. Curdy to Ms. Sniecinski. She did not remember any complaints about pregnancy. She had no recollection that Curdy had made offensive pregnancy comment because she did not have them noted [400b-402b]. Ms. Stone changed her testimony during the following cross-examination as follows:

Q. Why don't you look at page 39 of your deposition, ma'am, line 11? Are you there?
A. Sure, yeah.
Q. "Did you hear from Marcia or any other individual that Mr. Curdy had made a comment, derogatory comments about pregnant women or hiring fertile women?" Your answer was:
A. "Did I hear that from anybody?"
Q. "Yes".
A. "Including Marcia?"

Q. "Correct."
A. **"I heard from Marcia there were some inappropriate comments."**
Q. Comments made. "Okay. Do you remember what those comments were?"
A. "I think she stated he said something about a chair."
Q. "Sit in that chair and you get pregnant?"
A. "Something about that."
Q. There was a comment. Okay. And then on page 40 I asked you on line 5: "But you do remember a conversation with Marcia where Mr. Curdy had allegedly made some statements about pregnancy or women?" And your answer was:
* * *
A. **I said: "Yes. I think I do."**
Q. "And not only did you think you did you remember talking to Mr. Curdy about it, didn't you?"
A. **It says: "Yes."**
[269b-271b].[21]

Despite Plaintiff's complaint, Ms. Stone did nothing to follow them up. [271b-272b]. Stone did not mark it down in her Franklin Planner. [272b]. She did not put it in Mr. Curdy's file. Stone did acknowledge that Sniecinski was concerned about Mr. Curdy "**sabotaging**" the interview process. [Id]. Stone's Franklin Planner notes state: **"(all had thoughts of Mike sabotaging)**. [Exhibit 55 Friday, August 20, 1993 notation 584b].

After Plaintiff went off on pregnancy leave, Stone had a number of conversations with Mr. Curdy and Mr. Whitford. However, the specific content of these conversations, by and large, failed to make their way to the pages of Ms. Stone's Franklin Planner.

Q. "And again those results and conversations are not here in your Franklin Planner, is that true?"
A. No they are not.
Q. And they are not in any other notes that have been produced in this case. Is that true?
A. No. I did not have anything else. [274b-275b].

Joel Gibson was the head of human resources for the eastern-portion of Michigan for the Defendant BCBSM. If Mr. Gibson gave Stone an order, she followed it. [276b].

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[21]This is clearly contrary to the Defendant's allegation that no one corroborated the statements of the Plaintiff at trial. Ms. Stone, a very hostile witness, corroborated that at the time of one of the alleged occurrences the Plaintiff complained of pregnancy related comments.

Stone identified Exhibit 55 as her Franklin Planner notes. [Id]. In conjunction with the aforementioned calls, **Ms. Stone admitted that Mr. Curdy and Mr. Whitford called her together on a number of occasions for the purpose of putting discipline into the Plaintiff's personnel file after the fact. This seemed very unusual since, at this point, the Plaintiff was still employed by BCNEM and Curdy and Whitford were working on the behalf of BCBSM.**[22] Ms. Stone on initial cross-examination did not agree. The testimony was as follows:

"Q. Now, it would also be odd for Blue Cross Blue Shield supervisors to be trying to discipline Blue Care Network employees. Is that true?
A. No.
Q. Would you agree that it would be unusual for Mr. Whitford to be calling you to try to discipline Marcia for pregnancy and/or attendance issues?
A. **Mr. Whitford alone didn't call. That was always in conjunction with Mr. Curdy.**
Q. **So after they determined that she was pregnant in late August of 1993 you would admit that Mr. Curdy in conjunction with Mr. Whitford called you on a number of occasions?**
A. **They called me.**
Q. Okay. And --
A. I don't know how many occasions. But they called.
Q. And they were conference calls, were they not?
A. Yes
Q. And they wanted you to put discipline for Marcia's prior attendance in her file. Is that true?[23]
A. There was an issue surrounding it, a note. Yes.
Q. And that would be very unusual in your experience. Is that true?
A. I don't think the scenario that you're asking me about is unusual.
[280-281b]

Ms. Stone again changed her testimony when confronted with her prior testimony at her deposition. She was referred to page 88 of her deposition with the following cross-examination.

Q. Line 16: "And Don Whitford, was he a Blue Cross Blue Shield employee at the time or a Blue Care Network?"

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[22] The reality is, again, very different from the facts as put forth by the Defendant. Ms. Stone acknowledges that Curdy made statements and took aggressive and hostile actions against the Plaintiff immediately after finding out that she was pregnant.
[23] One must also remember that the discipline that they were trying to get into her file was based on events that had occurred almost one-year before. They had taken no action on this until they found out that she was again pregnant.

A. "No. He was a Blue Cross employee." ...

* * *

Q. Okay. My next question was: "Would Blue Cross employees regularly be calling about Blue Care Network employees' discipline for them?" And your answer was:

A. "That would be very unusual." [282b-283b]

In Stone's Franklin Planner, August 31st has a notation Don Whitford called regarding Marcia. [586b] That, of course, was less than one week after he became aware that Ms. Sniecinski was pregnant. The Franklin Planner notes reveal on September 2nd, there was another notation "Call Don Whitford regarding Marcia Jacobs."[24] [See 587b &284b]. On September 3, 1993, there is another notation "**Mike disagrees with me per Don W. on Marcia Jacobs**". That was regarding discipline for Marcia. [284b-285b]. Again, just a little over a week from the time that Whitford and Curdy found out that Ms. Sniecinski was again pregnant.

The discipline that Mr. Curdy and Mr. Whitford wanted put in Ms. Sniecinski's file occurred, however, back in January 1993. In January 1993, Mr. Curdy attempted to discipline Ms. Sniecinski in conjunction with time she missed regarding her earlier pregnancy. Ms. Stone, at the time, told Mr. Curdy that he did not follow the appropriate protocol. [286b-288b].

Though Ms. Stone attempted to deny the timing of the original discipline, Mr. Curdy's letter is dated January 27, 1993. While Ms. Stone was not sure of the dates, she was sure that Mr. Curdy did nothing to follow up with the discipline at the appropriate time. [Id]. There were additional messages, however, in Ms. Stone's Franklin Planner. On Friday, September 3rd she left a message with Joel Gibson "Don wants Blue Cross Blue Shield rep". According to Ms. Stone, Mr. Whitford wanted to talk to somebody at Blue Cross. Whitford had talked to Mike Curdy and was calling Stone. The relevant portion of these conversations were as follows:

A. Are we talking about Friday the 3rd here?
Q. Yes
A. "Left message with Joel." That's correct
Q. "Don wants Blue Cross Blue Shield rep."

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[24]Jacobs was the Plaintiff's maiden name.

A. Yes. HR rep.
Q. And that was regarding Marcia, was it not?
A. He wanted to talk to somebody at Blue Cross.
Q. He was -- Strike that. And this, again, was Mr. Whitford acting. Is that true?
A. I believe he had talked to Mike and was calling me. Yes.
Q. And Don Whitford wanted a Blue Cross Blue Shield HR rep regarding Marcia? Is that true?
A. What was he wanted to talk to Joel. Joel is my supervisor.
Q. Okay. Then on the 16th of September there is another conference call. This is now about three weeks after Marcia is discovered to be pregnant, assuming that that occurs on or about August 25th of 1993. Is that true?
A. Yes. There is another notation here. That is true.
Q. "Mike Curdy, Don Whitford, conference call." And you have no notation specifically of what the conversation was. Is that true?
A. My conversations at that time are regarding attendance. But there's no notation.
Q. Well, there is a little notation a little further down. **It says: "Don wanted threat in personnel file." Is that true, ma'am?**
A. That's the message I was talking to you about earlier there. **Yes. He wanted that in the file. And I said it's not appropriate at this time.**
Q. And did Mr. Whitford tell you why he wanted a threat in her personnel file?
A. When he used the term "threat" he was talking about the counseling -- or that memo. It wasn't this awful term "threat". But that's the term he used.
Q. And that's what you wrote down?
. And was that contemporaneous then, too, as you remember it?
A. As I said to you, I don't remember if it was at the time or directly after the conversation.
Q. What was the reason that he now thought that he needed to have a threat in her file, ma'am?
A. He felt that January 27, 1993 memo to file should stand in the file.
Q. Because he now knew she was pregnant?
A. No. Because she was continuing to have attendance problems. Not because she was pregnant.
Q. And it just so happened that the attendance problem on this occasion was pregnancy? Is that true?
A. What I'm speaking of attendance and when I spoke of attendance with Don and Mike -- Attendance doesn't only mean off work. It can also mean tardiness. So attendance can take in more than a couple of -- you know, more than just one issue here.
Q. On September 16th she wasn't tardy, was she?
A. I don't know if she was tardy on September the 16th.
Q. She was off on pregnancy leave already at that time, wasn't she ma'am?
A. As a matter of fact, the 10th I think was her last day.
Q. That's correct. So on the 16th when they want to put a threat in her personnel file they know that she was just gone off within the week for pregnancy leave. Is that true?

A. I don't know when I would have notified 'em. But I would think it would be shortly right around there. Yes.
Q. "And Don wanted in writing to Mike -"And then what does the rest of it say?
A. I replied I'll check. What he wanted me to do was write to him why I wouldn't put that in the file. And I suggested we'd set up a meeting to talk about it.
Q. Okay. September 20th: "Mike Curdy and Don Whitford called again." True?
A. Yeah. She was still out ill.
Q. Out pregnant, true?
A. True
Q. "Question of discipline. Didn't report -- " And then it's "-- per Joel Gibson." True?
A. That's true.
Q. Didn't report in writing. But you knew at the time that she had an excuse, pregnancy leave, didn't you ma'am?
A. She was on an approved disability leave.
Q. October 6th: "Mike Curdy, Marcia." True?
A. True.
Q. And Mike Curdy at this point, once unification occurs, isn't even going to be Marcia's supervisor or team leader, is he? He was going to be in Flint, true?
A. That's true.
[Stone @ 289b-293b *also see* Trial Exhibit 55, 581b-593b].

Franklin Planner notes also divulge that Marcia had told Pat Stone that she had left messages on Mike Curdy's car phone. [294b]. Calls that Curdy purposefully never returned.

Regarding Mr. Curdy's statements about the pregnancy chair, if Ms. Stone wrote them down, she could not find them in her Franklin Planner for the Plaintiff. Stone denied that Plaintiff came to her office immediately after the interview. That is clearly contrary to the testimony of Ms. Sniecinski who was adamant that she immediately went to Ms. Stone's office after Curdy made the statement. Nevertheless, Stone's Franklin Planner is silent regarding the conversation that took place between Ms. Sniecinski and Ms. Stone immediately after the interview for the Blue Cross position. [304b].

On re-direct examination of Ms. Stone by Mr. Feinbaum, Ms. Stone tried to explain some of her Franklin Planner notes. Specifically, the note regarding the use of the word "threat" in relation to the Plaintiff. Plaintiff then had the opportunity to re-cross examine Ms. Stone. Again

she was impeached and admitted that Curdy and Whitford took hostile action against the Plaintiff as soon as they found out she was again pregnant.

Q. Ms. Stone, when you testified on Thursday under my cross-examination you did so honestly. Is that true?
A. Yes.
Q. Now, regarding the conversations that Mr. Curdy and Mr. Whitford had in those conference calls after they determined Mrs. Sniecinski was pregnant they wanted you to put discipline back in that file. Is that true?
A. They were discussing whether or not the January 1993 note to file should have been in the file.
Q. So the answer is yes, they wanted discipline put back in the file?
A. They termed it a discipline. I didn't. Yes. That's right.
Q. **And they termed it they wanted a threat in her file. Is that true?**
A. **Don used the term "threat". That's true.**
Q. And that's what you would have done, correct?
A. But many of our supervisors and managers don't use the correct terms in those sorts of situations.
Q. **In that regard he used the word "threat." Is that true?**
A. **That's my recollection.**
Q. **And that was within a week of finding out that she was pregnant. Is that true? A week or a couple of weeks?**
A. **I believe the conversation was in September or October.**
[444a-445a]. [Emphasis added] [Also See Exhibit 55 581b-593b].

As of October 11, 1993, Ms. Sniecinski would have only been off work approximately one month. Stone had no reason to believe she was going to go on long term disability at that time. She would have been surprised and not expected the pregnancy to go into a long-term disability situation. [294-295b].

Stone initially testified that there was no requirement that one be placed back in their prior position, assuming that it was open, after a long term disability leave. The specific testimony was as follows:

Q. ... If you go off on long-term disability and your job is open when you get back, you get your job back?
A. **Not necessarily.**[25]
Q. Not necessarily?

[25] This is a misstatement and it would appear that Ms. Stone knew it was not factual when she testified under oath. *See infra and supra.*

A. We have no obligation to return you to any job. You're separated from the company basically. [296b].

After Stone gave this testimony, she was forced to retract her prior statement. She admitted that the BCBSM long term disability provider is the same as the BCNEM provider. She then reviewed the long-term disability policy found in Exhibit 15. It is the BCBSM reinstatement policy for long term disability. Ms. Stone was then asked:

Q. But it is the reinstatement policy for long term disability, isn't it, ma'am?
A. I don't know because this isn't the policy that I go by. This is the long-term policy, long-term disability issue I use.
Q. You didn't identify this in your deposition ma'am?
A. I think what I told you is this is a Blue Cross policy.
Q. Assuming that -- Didn't you testify that the same administrator is --
A. The carrier.
Q. --the same plan for Blue Care Network and Blue Cross?
A. The carrier is the same.
Q. Do you know that the policy is any different?
A. I don't think that there's a lot of differences in the way we administer things. No.
Q. So paragraph 17 says what, ma'am?
A. Page 3?
Q. Right.
A. **"If the returning employee's most recent position is open, he or she will be reinstated to that position."**
Q. And in your deposition that's what you testified you would do at Blue Care Network? Is that true?
A. I don't remember testifying to that. And I don't understand how you're getting to that with this document.
Q. **Okay, ma'am. Let me show you a Blue Care Network document that I'll mark as 56. This is a letter to Marcia Sniecinski on May 26, 1994. Is that true**?
A. Yes.
Q. And that is from April Williamson, your assistant. Is that true?
A. Uh-huh
Q. Is that true?
A. Yes. I'm sorry.
Q. Okay. And this was sent to Ms. Sniecinski a week after she called you inquiring about the position back at Blue Cross Blue Shield. Is that true?
A. I believe so.
Q. So she called you on May 20th, and then this letter went out on May 26th. Is that true?
A. Yes.
Q. Okay. But her long-term disability, I take it, started -- she was separated allegedly on March 1st?

A. Yes.
Q. So this letter doesn't go out for all of March, all of April and almost to all of May until Ms. Sniecinski calls you. Is that true?
A. Yes.
Q. **Okay. Now, let's go through the paragraphs if you recognize the Blue Care Network terminology better. Paragraph 1, what is the policy?**
A. It says: "If the returning employee's most recent position is open, he or she will be reinstated to that position. We have no open position due to marketing unification."
Q. So that is the same paragraph as in the other document I showed you at Blue Cross Blue Shield, true?
A. True.
Q. And No. 2 says: "If during the leave the position was filled by another regular employee on a temporary basis, the returning employee will be reinstated to that position." Is that true?
A. True.
Q. And that is analogous to the paragraph 18 in the other document I showed you from Blue Cross Blue Shield that was Exhibit 15. Is that true?
A. To me this is referring to benefits while on leave. And that's whey I'm confused by it. Okay? I'm sorry. Here's reinstatement. I just didn't see that.
Q. Are they the same?
A. Yes
[Stone @ 297b-300b] also see and compare Long Term Disability Policies found in Trial Exhibits 14, 15, & 56; 433-434b, 436-439b, 594b]

Marcia Sniecinski attempted to return to work on May 20, 1994. The date that her pregnancy related disability ceased. Stone's Franklin Planner under an April 27th notation said "Marcia returned to work 5-25". [301b,592b]. The full paragraph reads "Marcia returned to work 5/25. **Joel will check and to get back to me." [Id]. At that point, it is very clear that Joel Gibson was checking with Whitford & Curdy to see whether Ms. Sniecinski was going to be transfered/hired by Blue Cross Blue Shield. Stone admits that he was looking to see if the position was open.** [301b][26]. There was no mention in the record, at this point, that there was any window of opportunity that had been missed. Mr. Gibson then allegedly informed Ms. Stone that there was a freeze on hiring due to the loss of Medicare business. [302b].

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[26]Obviously there was no window of opportunity ever stated to the Plaintiff or put forth to Ms. Stone or to Mr. Gibson. Otherwise, why would one be checking on April 27, 1994, if Ms. Sniecinski's "window of opportunity" had lapsed on March 1, 1994. Moreover, it was well established that the position of Account Representative was open on May 25, 1996. The only reason that she was not transferred/hired at this point is pregnancy complications.

Stone recognized that as the Human Resource person for Blue Care Network she had to give priority to Blue Cross Blue Shield workers who were displaced. Blue Cross advised Ms. Stone that displaced, Blue Cross workers had to be given first shot at open positions. [303b].

Trial Exhibit 13 is the Blue Cross Blue Shield Policy for identifying internal candidates for employment opportunities. [425b]. The policy provides "along with the management reviews qualification and considers candidates in the following order with the best qualified candidate given top priority." The first priority is a displaced employee. **The second priority is an individual returning from long-term disability.** [303b-304b]. A displaced employee would be someone who is returning from the Medicare freeze. The second priority would be someone like the Plaintiff who is coming off long-term disability. [Id]. The fact is that the job was open, not filled by anyone, and the Defendant would still not transfer the Plaintiff over. The Defendant never provided the jury any reason for this peculiar conduct.

G. Testimony of Michael Curdy

Mr. Curdy, was the marketing director at Blue Care Network of Eastern Michigan. For the years 1989 - 1993, Mr. Curdy admitted that the Plaintiff was the telemarketing representative of the year, and by objective criteria's did exceptional work. He recognized that Plaintiff achieved results that amounted to 242% and 300% of quota and acknowledged that she was admitted to the Vice President's Club. [167b-169b].

At his deposition, and on direct examination by defense counsel, Mr. Curdy had no difficulty denying a variety of actions or inaction's that had been put forth to him by defense counsel. However, on cross-examination, Mr. Curdy's memory evaporated. He did not remember the following: (1) that the Plaintiff had pregnancy complications in 1989; (2) that he had conversations with her in 1989 regarding pregnancy; (3) He did not remember anything regarding her pregnancy in 1992; (4) that t Plaintiff had pregnancy complications in late 1992 and early 1993; (5) conversations with Plaintiff after she miscarried in 1993; (6) That Plaintiff found out that she was pregnant after the interview in 1993; (7) Ms. Sniecinski being livid at the

end of the interview in August 1993; (8) being confronted by Pat Stone regarding pregnancy related statements that he had made to Ms. Sniecinski; and (9) Mr. Curdy did not remember being confronted by Pat Stone for harassing the Plaintiff. Indeed, Curdy stated his memory was sketchy for the entire time that he was asked questions. Mr. Curdy ultimately admitted that the testimony he gave to Mr. Feinbaum on direct examination was not from direct memory, but, rather, was indeed based upon his character. He relied only on his character as a basis for denying the statements asked by Mr. Feinbaum. [170b-174b].

Mr. Curdy's character was brought into question under cross-examination.. Prior to the testimony at trial, however, Mr. Curdy's deposition was taken. Prior to Mr. Curdy's deposition, he had been given a copy of the Plaintiff's deposition by Defendant's counsel Mr. Feinbaum. He was also given additional information. At his deposition, however, Mr. Curdy denied being given other germane information. That testimony from the deposition was read during a cross examination at trial and went as follows:

"Q. Other than reviewing Ms. Sniecinski's deposition, have you done anything else?
"A. We talked a week or so ago to schedule this meeting.
"Q. What was said at the discussion?
"A. I called him in response to a, I believe it was a subpoena that was delivered to my home and asked if we could reschedule it.
"Q. Was anything else talked about at that time?
"A. No.
"Q. Anything substantive regarding any claims or defenses that are being raised in this case?
"A. No.
"Q. Did you ask him at any time from the time you received Ms. Sniecinski's deposition, anything regarding anything said in her deposition?
"A. No.
"Q. Have you sought advice or input from any other party regarding anything that was said in the deposition?
"A. No.
"Q. Did you make any personal notes regarding anything in the deposition?
"A. No.
"Q. Do you have any personal diaries, calendar or any other types of notes or memorandum that would in any way be able to refresh your recollection of what transpired back in 1993 or 1994?

"A. No.[27]
[177b-180b].

After this testimony, however, it was apparent that Mr. Curdy had not told the truth. With him at the deposition was a little manila folder. In the folder was a one-page document that was not admitted at trial based on the judge's ruling.[28] However, the substance of the document was specifically gone over on cross-examination. Mr. Curdy had testified previously that he had told counsel for the Plaintiff everything he had done in preparation for the deposition. This document, however, belied that testimony. Mr. Curdy wrote in his handwritten note that "**Nobody has supported anything that Marcia said about me**". The note went on to say "**I just need to say I didn't say that**". Plaintiff's argument, of course, was of Mr. Curdy, thinking to himself, wrote down that he was told that nobody had seen or corroborated what Marcia said he could just deny saying those things. That is he could say, "I didn't say that".

The document also stated that "**Other attorney will try to make it look like I rescinded her job offer, Whitford did, I did not have that authority**". [183b-186b].

Mr. Curdy admitted that he talked to Whitford on a daily basis. That one of his jobs was to provide Whitford information regarding Blue Care Network employees. One of those individuals that he would have talked to Mr. Whitford about was the Plaintiff. During the period of the sales effectiveness project, he worked in conjunction with Mr. Whitford. During that whole time he was a Blue Care Network employee. He never received permission from Blue Care Network to work for Blue Cross Blue Shield. If Mr. Whitford told him to do something, he did it. There were never any objects or supplies that Mr. Curdy could not use because they were Blue Cross supplies as opposed to Blue Care Network supplies. During the entire time, Mr. Curdy continued to receive his paycheck from Blue Care Network while essentially only performing tasks for Blue Cross Blue Shield. [186b-191b, 196b-197b].

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[27]This is the actual deposition transcript. It is garnered at trial over numerous pages.
[28]Judge Battani ruled that the document itself was hearsay and the document could not be admitted.. Nevertheless, the fact that the document was not per se admitted is not relevant. The entire document was read into the record and heard by the jury without objection.

Mr. Curdy testified that regarding unification, he was anticipating that no one would be fired and that no one would lose their job. He knew long before November 22, 1993, the actual date of the unification, he was going to be a team leader. He did not recall the exact date but he knew it was before July 12th. [194b, 196b].

Mr. Curdy admitted that the actual decision was a tripartite decision between himself, Mr. Whitford, and Mr. Roseberry as to what individual was offered any specific job. He testified they reached on consensus while they did not necessarily always agree. [193b, 198b-200b].

Mr. Curdy testified that Marcia Sniecinski was a woman who was both honest and had substantial integrity. Indeed, had she not, he would have written her up for the failure to show honesty or integrity in the course of her employment. He could give no motive for Marcia Sniecinski to make up these things regarding him, if they were not true. [191b-193b].

Mr. Curdy testified that BCNEM and BCBSM acted as one entity. That was his excuse for releasing medical information to BCBSM without a signed release from the Plaintiff. [198b-202b]. Curdy testified that he had not ruled out going back to BCBSM at a later date. [188b].

Mr. Curdy had not been informed by Mr. Whitford or anyone else regarding a window of opportunity for Marcia. He was not aware of a Medicare freeze. [189b]. Mr. Curdy did, however, give frank opinions regarding employees from Blue Care Network of Eastern Michigan to Mr. Whitford. [190b].

Regarding the interviews, Mr. Curdy's belief was he was just placing positions. Everyone was being transferred and all seniority was protected. No jobs would be lost. Everyone who applied would have a position. The best and the worst performers were all going to be transferred. [194b][29]

Curdy testified that he did have a cell phone at the time. He did not remember returning Marcia's calls. It was not his practice to always return his calls. [202b-204b].[30]

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[29] The Defendant's allegation that "Plaintiff's claim that her job was merely 'transferred" to BCBSM is therefore clearly wrong" is further impeached.

[30]Evidence is clear that in the Franklin Planner notes of Pat Stone the Plaintiff had complained that Curdy was not returning her calls.

Finally, Mr. Curdy testified that there was great job security at BCBSM. Indeed portions of his deposition were read back to him wherein he agreed that you just don't come out and terminate someone at BCNEM or BCBSM. You had to use a series of progressive discipline. Even if someone was violent or caught in theft, one would have to go through HR. The end of Mr. Curdy's cross-examination summed up the essence of the case. The relevant colloquy was as follows:

"Q. So it was not easy to terminate people. Is that true?
"A. I would say yeah, that's true.
"Q. So if one wanted to get rid of someone it would just be the most effective way not to hire them. Is that true?
"A. If one wanted to get rid of somebody?
"Q. Right. If you don't hire them you never have to fire them. Is that true?
"A. Oh, that's true.
[205b-206b].

H. Testimony of Donald Whitford.

Donald Whitford was in charge of the unification of the Marketing departments between BCBSM and BCNEM. [235b-236b]. The project had its origins in 1992 and Mr. Whitford admitted that the jobs were all requisitioned back in 1992. [Id @ 236b]. There were positions requisitioned, or approved, for each and every person who was at BCNEM and BCBSM, including the Plaintiff Marcia Sniecinski. [236b-237b]. Each one of those "EMPS"[31] had budgetary approval before Mr. Whitford came to lead the unification project in mid 1993 [237b].

Like Mr. Curdy, the testimony of Mr. Whitford was often discredited. He tried to distance himself from Curdy. He testified that he did not talk with Curdy on a daily basis. That was contrary to the testimony of Curdy as well as his own deposition testimony. Indeed, at the time of his deposition he stated he would talk with his sales managers on a daily basis without any doubt. He further stated that this applied to Mr. Curdy [254b-256b].

Mr. Whitford acknowledged that he knew nothing about the individual candidates and would have received most of his information regarding the plaintiff from Mike Curdy. [219b,

[31] EMPS is a slang term used by BCBCM to represent employees.

228b]. Whitford had acknowledged that Curdy had raised issues regarding the Plaintiff's pregnancy. He admitted that Curdy viewed this as a weakness. [219b-220b].

Whitford admitted that BCBSM reliance on a "Medicare Hiring Freeze" as an excuse to not hire the Plaintiff was a mere pretext. **As Whitford stated, "The Medicare Hiring Freeze was not a reason for her not getting her job"** [217b, 219b].

However, Whitford also admitted that Joel Gibson was the head of HR at BCBSM and that he would have conversations with Gibson regarding the Plaintiff. He sought guidance from Joel Gibson. [217b-219b]. Mr. Gibson stated at his deposition, as admitted by Defense Counsel, **that the sole reason that the Plaintiff did not get her job was a Medicare Hiring Freeze.** [218b]. [32] This admission, is clearly at odds with the position at trial, heard for the first time, that there was some window of opportunity that the Plaintiff allegedly missed.

Critically, Whitford, with Curdy, made repeated calls to Patricia Stone, in advance of the unification so that they could get a "**threat**" over Marcia. Both gentlemen denied entering into any such conference calls with Ms. Stone. [237b]. The specific testimony with Mr. Whitford was as follows:

> "Q. Isn't it true, sir that the week right after you offered her the job when you found out that she was pregnant that you and Mr. Curdy started calling Pat Stone and trying to have her written up?
> "A. That is not true.
> "Q. You're sure of that?
> "A. I'm positive of that.
> [237b-238b].

Whitford further testified that it would be unusual for him to try to get discipline into a BCNEM employee's file. He denied calling Stone to put discipline in the Plaintiff's file. He denied having conference calls with Curdy for this purpose with Pat Stone. [239b-240b].

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[32]Though Gibson was not called as a witness at trial he did testify that the sole reason that the Plaintiff was not given her job was because of a Medicare Hiring Freeze. Defendant, through counsel admitted this wherein counsel for the Defendant objected and stated the following: "Your Honor, Counsel is mischaracterizing Mr. Gibson's testimony. He made that statement on one page. Then I think about two pages...later he clarified his answer." [218b]. The fact is that the Defendant chose not to bring in Mr. Gibson to further "clarify" the issue.

However, the testimony and Franklin Planner notes of Ms. Stone showed that Curdy and Whitford were regularly calling Stone as soon as after they found out Plaintiff was pregnant. Furthermore, the purpose of their calls was to place discipline in her file for her prior miscarriage and pregnancy that took place in January 1993. Specifically, on 9-16-93, only weeks after they found out she was pregnant and less than one-week from the time she went off work, Whitford, **"wanted threat in personnel file"**. Whitford also wanted a letter in writing to Curdy. Not happy that Ms. Stone would not put a threat in the Plaintiff's file on 9-16-93 the two gentlemen called back on 9-20-93. At this time they now want Stone to discipline her. This time they have summoned the help of Joel Gibson. Plaintiff has now been out pregnant just about a week. One must remember that neither Mr. Curdy nor Mr. Whitford were supervising Plaintiff at this time. Both men were in Flint working on the Unification. Marcia was in Saginaw at BCNEM. On October 6, 1993 Curdy called Stone again. [*See* Stone *supra*, Exhibit 55 581b-593b].

The Franklin Planner notes of Ms. Stone, in conjunction with her testimony, demonstrate that both Mr. Curdy and Mr. Whitford were less than candid. Finally, Whitford confirmed that job security was exceptional at BCBSM. For the five years after the unification he had not terminated anyone. Even those employees who had performance problems. [225b].

I. Plaintiff's Search for Comparable Work Began as Soon as She Was Advised That Her Job That She was Offered And Accepted Had Been "Eliminated".

Immediately after Plaintiff was advised that her position was eliminated, the Plaintiff looked in the private sector to see if there was alternative and comparable employment. She talked with people at BCNEM about comparable positions. [157a-158a]. Her desire was to get back to BCBSM to the job that she was offered and accepted. [158a].

Mrs. Sniecinski did not have an insurance license. She had no experience in any line of insurance except health. She had no interest in selling other lines of insurance, except health. In the course of her 13 years she had a good idea of what other insurance agents did in the course of their employment. [162a-165a].

From May 1994 until December 1994, Mrs. Sniecinski went through the yellow pages and contacted insurance agencies, offices and individuals that she knew. [157a—160a & 265a-267a]. That is significantly different from the Defendant 's purposefully deceptive description of Plaintiff only contacting only four (4) employers. [See Defendant's Brief p. 11][33].

The evidence of record clearly shows that the Plaintiff merely gave four examples of agencies that she contacted at her deposition before she was cut-off. She contacted agencies that she knew and went through the yellow pages. The problem, however, was that almost all of the comparable jobs that she found required a degree and/or an insurance license. Those would be positions comparable to the one that she had at Blue Cross Blue Shield. Other jobs in the private sector required a license. The jobs in the private sector were different because they required selling a broad line of insurance and required licensure. At BCNEM and at BCBSM she sold, and would have prospectively sold, only health insurance. Plaintiff was not required to have a license because she worked under Blue Cross's license. [157a-160a and 266a-268a].

Plaintiff also explained that selling health insurance was not the same as selling other types of insurance. She had no experience or desire to sell auto or life insurance. They were completely different entities. Agents in the private sector had to work off-hours and had to work nights and weekends. They worked in excess of 50- 60 hours per week and that there was a very high failure rate. [161a; 264a-266a]. Moreover, she had no license for any type of insurance because as a BCNEM representative she worked under the license of Blue Cross. [158a-159a]. It could take years to get fully licensed. These private sector jobs were not comparable to the Plaintiff's position at BCBSM where she would have generally worked approximately 40-45 hours per week with few or no nights and/or weekends. [163a-165a & 265a-267a].

Defendant named two (2) vocational experts in their list of witnesses, Defendant, failed to call either expert.[34] Consequently, all of the testimony of the Plaintiff regarding her job, the

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[33] Defendant has misstated this fact at every level of this litigation.

[34] One expert was abandoned long before trial. However, a late addition was added, a Mr. Hostetler. Mr. Hostetler's deposition was taken shortly before trial. Mr. Hostetler could not identify a single comparable job that the Plaintiff could have obtained with her

inferior job that she took with BCNEM, her subsequent job search, the job markets, and her inability to get a comparable job with her limited education went to the jury without contradiction.

J. Offer of Inferior Position.

In December 1994, Plaintiff was contacted by April Williamson, an assistant to Pat Stone, from BCNEM. Plaintiff was advised that there was a position at BCNEM. The position was for a non-group position. Plaintiff applied and was given the position. Exhibit 34 (456b) is the job description. This position had little relation to the position that the Plaintiff would have had at BCBSM. [160a-162a]. The job paid about 1/2 to 2/3 of what the BCBSM job would have paid her. There were no bonuses. Moreover, there were not the advancement opportunities. [162a-164a, 262a]. Nevertheless, Plaintiff accepted this job with the hope of getting back to BCBSM. [164a]. The job, however, was clearly inferior in terms of pay, advancement opportunities, fringe benefits and the like. [*See supra* & SJI 2d 105.41]. Therefore, pursuant to the mitigation doctrine, the Plaintiff was not obligated to accept it. Nevertheless, she accepted the inferior position with the hope of ultimately working her way back to the job that she was previously offered, accepted, and then denied because of her pregnancy. [164a].

The inferior position at BCNEM, however, was emotionally uncomfortable. She was working with the same people who she had worked with for years. Except these people now worked for BCBSM and she was in an inferior position to these people. Individuals who Plaintiff had outperformed consistently. This, she stated, was very humiliating. [164a-165a, 168a, 261a-262a]. In addition to feeling humiliated, people would ask her questions why she did not get the job at BCBSM. Plaintiff's co-workers regularly asked her about the events that lead her to not getting the job at Blue Cross Blue Shield. (168a) This had the effect of upsetting Mrs. Sniecinski. She felt humiliated. She was very upset with Mr. Curdy. (Id). Nevertheless, when

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educational status. Therefore, he was not called and the Defendant did not fulfill its burden of proof in demonstrating that the Plaintiff had failed to mitigate her damages.

she went back to Blue Care Network in 1994, she still did a good job. She got good reviews. Those reviews can be found in Trial Exhibits 7, 8. [168a-169a, 411b-420b].

The very day after BCNEM contacted the Plaintiff and she started work for BCNEM, the Defendant BCBSM filled the Account Representative position at BCBSM. Plaintiff started on 12/16/94 at BCNEM. On 12-17-94, Kim McDonald became an account representative at BCBSM.][35] This filled the position that the Plaintiff previously was offered and accepted. [167a-168a] Defendant failed to provide any explanation for the coincidental filling of the BCBSM position the day after the Plaintiff was called in by BCNEM.

By March 1996, Mrs. Sniecinski became increasingly frustrated. That is when she filed the lawsuit that is the subject matter of this litigation. Defendant answered the lawsuit in July 1996 without citing an affirmative defense of failure to mitigate damages as is required in the Michigan Court Rules. Between the time that Mrs. Sniecinski returned to work at Blue Care Network and the time she filed her lawsuit, Blue Cross Blue Shield never offered her the job of the position of Account Representative. (169a-171a).

K. The New Posting of the Account Representative Position by BCBSM with The Requirement of a Bachelor's Degree.

In August 1996, immediately after Mrs. Sniecinski filed her lawsuit, the position of Account Representative was re-posted by the Defendant. [170a-171a) The date of the posting is August 22, 1996. (529b), So one month after Defendant filed their Answer to the Plaintiff's Complaint, Defendant posted the Plaintiff's job. The new posting required a Bachelor's degree. [167a , 529b]. A degree was not previously a requirement for the position. Indeed, few of the actual BCNEM marketing people, including the Plaintiff, had a degree. [Id].

As soon as the Plaintiff saw the posting, she went to the Human Resource Department of BCNEM. [171a]. She was then instructed to contact BCBSM. She called and talked to the BCBSM HR person. She told the individual that she was interviewed and awarded the position back in 1993, and wanted to know if they would make the exception for her not having a degree.

[35]Ms. MacDonald had no prior sales experience. 167a

The BCBSM representative told her they would not. (172a-173a) Other than the requirement of a degree, the posting was the same as the job she was offered and accepted in 1993. [Id.]. The same job that her contemporaries from BCNEM were performing at BCBSM with no degree.

Plaintiff testified that after seeing her previous position posted with a college requirement she believed that there was no reasonable future for her at BCBSM. **She felt that she had been stripped of what she had earned through more than a decade of hard work and that they had "taken her future away from her"**. [172a-173a]. At that point she decided she **was not going to be humiliated anymore and she had had enough**. Specifically, she explained **that "it was the straw that broke the camel's back. I worked hard to get where I was. I deserved it. I earned it. And I'd had enough. I wasn't going to go through the humiliation anymore**. [173a]. It was the Plaintiff's intention to go back to school to acquire a bachelor's degree[36]. This she believed to be entirely reasonable as she had searched for over 1/2 of a year and each comparable job, to the one that she should have had at BCBSM, required a college degree. [see supra as well as the new posting by BCBSM also see. 171a-173a]. Other jobs in the private sector were not comparable and required degrees and/or licenses. Neither of which she had. [265-267a]. Plaintiff then decided that she would go back to school to get the degree that apparently was now required.. [172a-174a]. She then relinquished her inferior employment at BCNEM. Plaintiff testified she had no doubt that the difficulties that she had with her pregnancies was the reason that she did not get the job with Blue Cross Blue Shield. (Id. 175a).

L. The Testimony of Professor Calvin Hoerneman.

Professor Hoerneman is an economist. His deposition was read to the jury to establish what, if any, economic damages the Plaintiff suffered. Trial Exhibits 1 & 2 are Professor Hoerneman's calculations. [385b-386b]. Exhibit 1 assumes that the Plaintiff maintained the

[36]As the Court of Appeals correctly noted, to the extent that the Plaintiff graduated later than 2000 this would only hurt the Plaintiff. Her damages were calculated upon the premise that she could find comparable work in four years. [50a fn 3].

same inferior position at BCNEM until her expected retirement age. The Plaintiff's damages under this calculation would have been $436,212.69. [385b].

Exhibit 2 assumes that the Plaintiff started college in 1997 and finished in four years, or through the year 2000. At that time it was assumed that the Plaintiff would be able to find comparable work to BCBSM. Plaintiff's economic damages here were only $261,180.26.

The jury returned a verdict of $261,000.00 in economic damages. If the Plaintiff would have done what the Defendant suggests that she should have done, stay at an inferior position at BCNEM, her damages would have been 67% higher. Defendant has never been able to give any rationale explanation for their conclusion that this does not constitute adequate mitigation of damages. [Compare 385b with 386b].

ARGUMENT

1. THE TRIALCOURT DID NOT CLEALYABUSE ITS DISCRETION IN REFUSING TO GRANT THE DEFENDANT'S MOTION FOR JNOV/NEW TRIAL WHERE THE EVIDENCE OF RECORD OVERWHELMINGLY SUPPORTED THE JURY'S FINDING THAT THE DEFENDANT HAD VIOLATED THE ELLIOTT-LARSEN CIVIL RIGHTS ACT BY FAILING TO HIRE/TRANSFER THE PLAINTIFF FROM ITS WHOLLY OWNED SUBSIDIARY, BLUE CARE NETWORK OF EASTERN MICHIGAN, BECAUSE OF THE PLAINTIFF'S PREGNANCY AND PRIOR PREGNANCY COMPLICATIONS.

A. A Trial Court' s Denial of a Judgment Notwithstanding the Verdict will Not be Disturbed Absent a Clear Abuse of Discretion.

When reviewing a trial court's denial of a defendant's motion for JNOV, all legitimate inferences must be drawn in a light most favorable to the plaintiff. *Matras v Amoco Oil Co.* 424 Mich 675, 681; 385 NW2d 586 (1986). If reasonable minds could differ concerning whether the plaintiff has met her burden of proof, a judgment notwithstanding the verdict is inappropriate. *Byrne v. Scheider's Iron & Metal.* 190 Mich App 176, 179; 475 NW2d 854 (1991). A decision by a trial court to deny a motion for JNOV will not be disturbed unless there is a clear abuse of discretion. *Bordeaux v Celotex*, 203 Mich App 158, 164; 511 NW2d 899 (1993); *Michigan Microtech, Inc v Federated Publications*, 187 Mich App 178, 186; 466 NW2d 717 (1991).

B. The Court of Appeals Correctly Determined that there was a Plethora of Evidence that Supported the Jury Verdict and, Consequently, It was not an Abuse of the Trial Court's Discretion to Deny the Defendant's Motion for JNOV, New Trial.

A very educated jury in this case heard testimony for one-week and then reached a unanimous 7-0 decision that the Plaintiff's pregnancy and/or complications therein was a reason that she was not hired/transferred by the Defendant BCBSM. After reviewing the evidence, and having had the opportunity to observe the witnesses, Judge Battani opined that there was ample evidence to support the jury's verdict. [82-84b]. The Court of Appeals affirmed and gave a synopsis of that mass of evidence that supported the jury's verdict. The court explained:

> "Here in a light most favorable to plaintiff there was sufficient direct evidence of defendant's discriminatory predisposition and animus based on plaintiff's pregnancy and pregnancy related complications to submit the case to the jury. Plaintiff testified that when she announced her second pregnancy in 1992, supervisor Michael Curdy seemed upset and stated, "I'm not going [to] let anyone sit here again. It seems to be the pregnancy chair". Another worker had just returned from pregnancy leave. The Human Resources (HR) manager confirmed that plaintiff complained about Curdy's pregnant chair comment, but nothing was placed in Curdy's file as a result of that comment. Plaintiff also testified that Curdy said that she was not going to be allowed to use any sick time or unpaid leave for pregnancy. In addition, with regard to her 1992 pregnancy, Curdy asked her if she was going to have more problems with her pregnancy "like [she] had in 1989". When plaintiff returned after having a miscarriage in February 1993, Curdy raised the issue of her pregnancies and indicated with regard to future pregnancies that, "if [she has] this we'll have to deal with that problem if it comes." Plaintiff also indicated that Curdy tried to have her written up, but after the plaintiff complained to an HR manager, the memo was removed from her file. In addition, at the end of the first interview for the Account Representative position, Curdy told her to have a seat so they could "discuss an issue." He then allegedly said, in the presence of the two other interviewers, "You have problems with the pregnancies and we need to discuss the attendance of that." According to Plaintiff, Curdy also asked her if she thought her pregnancies would be a problem in the future. Plaintiff further indicated that, after learning that the Plaintiff was pregnant a third time in August 1993, Curdy told plaintiff, "I guess I shouldn't hire women in their childbearing years." We find that the remarks of Curdy, a supervisory or managerial level employee involved in plaintiff's interview process, constitute sufficient evidence to allow a jury to conclude that unlawful discrimination was at least a motivating factor in defendant's decision to discharge plaintiff from the AR position.
> "Contrary to defendant's claims, viewing the evidence in plaintiff's favor, there was evidence that Curdy was a decision maker for Blue Cross and Blue Shield of Michigan

(BCBSM). The evidence also showed that BCNEM (BCN) is a wholly owned subsidiary of defendant BCBSM. BCBSM Regional Sales Director Donald Whitford testified that the sales unification process for BCN & BCBSM was a tripartite decision and process by him, Curdy and Donald Roseberry, a BCN regional sales manager. Curdy and Whitford worked together on the unification plan on a daily basis and, even before the merger actually occurred, Curdy was acting as an employee of BCBSM. Curdy testified that he needed no special permission to perform essentially all of his work for the sales effectiveness project because BCN and BCBSM were "run as one" The AR hiring decision was made by Whitford, Roseberry & Curdy. [37] [47-48a].

A Plaintiff may establish a claim of pregnancy discrimination through direct evidence of animus to the Plaintiff, based on pregnancy. See, *Harrison v Olde* 225 Mich App 601; 572 NW2d 679 (1997). Direct evidence has been defined as "evidence that if believed "requires the conclusion that unlawful discrimination was at least a motivating factor." *Harrison v Olde* 225 Mich App 601, 610, 572 NW2d 679 (1997) *citing Kresnak v Muskegon Heights* 956 F Supp

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[37] Defendant spends considerable effort arguing that the Court of Appeals erred in deciding that BCNEM and BCBSM were run as one company. [Defendant's brief pp. 13-14]. Defendant further contends that the Plaintiff "tricked" the jury into believing they were run as one and that the success of the lawsuit was dependent on this "disingenuous, monolithic picture of these two companies." [Id @ 14] The *dicta* statement by the Court of Appeals that the two companies were run as one for purposes of the unification is irrelevant. Plaintiff only named the Defendant BCBSM as a defendant in this case. Plaintiff proved, through the testimony of BCBSM representatives and their subordinates at BCNEM, that each significant decision in this matter was made by representatives of Defendant BCBSM. That is, BCBSM decided to merge the marketing departments of BCBSM with its wholly owned subsidiary BCNEM. Further, BCBSM did not consult BCNEM about the unification, they just did it. BCBSM decided when and how everything would take place. BCBSM decided to keep the Plaintiff on disability with BCNEM as opposed to BCBSM. Defendant BCBSM decided to not have the Plaintiff become an employee while pregnant even though she could have easily signed the papers with everyone else. Defendant BCBSM prohibited the Plaintiff from becoming an employee by not answering phone calls and questions from the Plaintiff. BCBSM decided not to transfer and to not hire the Plaintiff. In doing so, the evidence overwhelming demonstrated that the Defendant BCBSM used employees, money, materials, of BCNEM as they were their own. Indeed, no BCNEM employee was given special permission or paid by BCBSM for their time. BCBSM's representative throughout the litigation was Pat Stone. Ms. Stone was an employee of BCNEM. She was the highest-ranking employee of BCNEM. Her bosses were all employees and high-ranking representatives at BCBSM. The statement of the Court of Appeals that the companies, for purposes of this "unification" were run as one is undeniably true. That statement, however, has little to do with the ultimate conclusion of the jury that the Plaintiff's pregnancy and

1327 (WD Mich 1997). A Plaintiff can also prove discrimination through the use of circumstantial evidence. Plaintiff does not have to prove both. It has been explained:

> The reasoning behind the *McDonnell Douglas-Burdine* burden shifting approach is to allow a victim of discrimination to establish their case through inferential and circumstantial proof. As Justice O'Connor has noted, "the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by." *Price Waterhouse v. Hopkins, 490 U.S. 228, 271, 109 S.Ct.* 1775, 1802, 104 L.Ed.2d 268 (1989) (O'Connor, J. concurring); *see also Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 105 S.Ct. 613, 622, 83 L.Ed.2d 523 (1985)* ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.' "); *DuPont, 100 F.3d at 1071* ("The distinct method of proof in employment discrimination cases, ... arose out of the Supreme Court's recognition that direct evidence of an employer's motivation will often be unavailable or difficult to acquire.")
> As such, a plaintiff may establish discrimination either by introducing direct evidence of discrimination or by proving inferential and circumstantial evidence which would support an inference of discrimination. *See Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1248 (6th Cir.1995)* ("a plaintiff may establish a prima facie case of discrimination either by presenting direct evidence of intentional discrimination by the defendant, or by showing the existence of facts which create an inference of discrimination."
> *Kline v Tennesee Valley Authority* 128 F3d 337, 348 (6th Cir. 1997)

In this case there was a plethora of direct and circumstantial evidence that demonstrated, by an overwhelming preponderance, that the Plaintiff's pregnancy, and prior pregnancy complications, were significant reasons that Plaintiff was not transferred/hired by the Defendant.

Defendant argues that the Court of Appeals erred in labeling this matter a "direct" evidence case[38]. The issue of whether there was direct or other circumstantial evidence is

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complications therein, were reasons that made a difference in the decision of the Defendant BCBSM to not hire/transfer the Plaintiff.

[38] The important distinction between direct and circumstantial evidence cases really is more germane at the summary disposition level. The cases that the Defendant now cites both involve motions for summary disposition. *See Harrison v. Olde*, 225 Mich App 601, 572 NW2d 679 (1997); *Krohn v Sedgwick James*, 244 Mich App 289, 624 NW2d 212 (2001).

In its brief in the Court of Appeals the Defendant relied upon a panoply of cases, under different laws, different factual scenarios, and different circumstances, in an attempt to get the court to do what the jury would not do. That is, ignore the clear edict of the Elliott-Larsen Civil Rights Act. MCLA 37.2101 et seq.. and allow the Defendant to discriminate against the Plaintiff based on her pregnancy. The cases cited by the Defendant, for that proposition, below, have now all been

irrelevant for purposes of this Appeal. The jury instruction does not differentiate between direct and/or circumstantial evidence. The issue is not what type of evidence there was, but, rather, the issue is whether there was sufficient evidence, when viewed most favorably to the Plaintiff, to support the jury's verdict that pregnancy was a reason that the Plaintiff was not hired. [See Jury Instructions 372b-373b]. Judge Batanni's refusal to reverse was not an abuse of discretion[39].

1. The Evidence at Trial Demonstrated that Every Person Who was Employed by the Defendant BCBSM, and/or its Subsidiary BCNEM, and was Placed on Long Term Disability and Requested their job Back was Given their Job Back if the Job was Open or Put in other Comparable Positions if the Job was not Open.

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abandoned. See, *Phelps v Yale Security, Inc.*, 986 F.2d 1020 (6th Cir. 1993) *cert den* 114 S Ct 175 (1993); *Sattar v. Motorola,* 138 F3d 1164 (7th Cir 1997), These cases were thoroughly distinguished in the court of appeals. As has been the Defendant's practice in the course of this litigation, once a defense proves to be untenable, Defendant merely switches to a new defense, or a new case, in the hope that something will absolve them of their legal responsibility. The *Phelps* decision cited by the Defendant below actually supported the Plaintiff's position where the Court declared "[a]ge-related" **comments referring directly to the worker may support an inference of age discrimination**. *citing McDonald v Union Camp* 898 F2d 1155, 1162 (6th Cir. 1990) Likewise, direct statements referring to pregnancy supports an inference of pregnancy discrimination.
Defendant cited the case of *Sattar v. Motorola* 138 F3d 1164(7th Cir. 1997) for the proposition that where a supervisor who has discriminatory animus was not part of the decision making process summary disposition may be appropriate. Sattar is also abandoned in front of this Court. In this case, of course, there is no doubt that the individuals who were demonstrated to have the pregnancy animus were the decision makers. Indeed, Whitford was the head of the entire unification project. It was further admitted that Curdy was a decision maker and acted as Whitford's right hand man. Whitford, did not personally know the Plaintiff and relied on Curdy for all of his information regarding her. It is doctrine of longstanding that where a decision maker is influenced by one who has discriminatory animus, the animus of the supervisor is imputed to the ultimate decision maker. *Rasheed v Chrysler* 445 Mich 109, 136; 517 NW2d 19 (1994); *Also See Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 524-525; 398 NW2d 368 (1986).

[39] "The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias".
Spalding v Spalding 355 Mich 382, 384-385; 94 NW2d 810 (1959)

Plaintiff established that the long term disability policy at both BCBSM and BCNEM were identical. Both plans were administered by BCBSM. Under both policies if one went off on LTD, and their position was open when they recovered, they were given their job back. Specifically, Exhibit 15 ¶ 17 states: "**If the returning employees most recent position is open he/she will be reinstated to that position**". [438b]. The Plaintiff unequivocally demonstrated that, at the time that she came off her maternity leave, her position was open. [See Exhibit 31 454b, and testimony *supra*]. Plaintiff was not transferred/hired like all other employees.

Exhibit 49 is Defendant's Answers and Objections to Plaintiff's third set of interrogatories. [500b-510b]. Four pages attached at the back of Exhibit 49 are very illustrative. [507b-510b]. The charts list every person who went out on LTD for the Defendant. Another column gives their LTD date. Another column shows whether the employee requested a return to employment. In each and every instance, 89 out of 89 non-pregnant employees were placed back in their positions or comparable positions. [507-510b]. More compelling is the fact that four of these individuals, S. Brown, J. Hemingway, C. Livous, and S. Rodges, were put back into their positions during the alleged Medicare hiring freeze.

2. Every Individual in the Marketing Departments of BCNEM & BCBSM were Transferred and Hired by the Defendant BCBSM Except the Plaintiff .

Plaintiff explained that she was not bedridden during the time of her pregnancy leave. The transfer of employees from the payroll of BCNEM to the payroll of BCBSM was a perfunctory task that merely required that some forms be signed and processed. Each and every person who was part of the merger, with the exception of the Plaintiff, was informed and processed on November 22, 1993. Therefore, plaintiff was the only person, because of her pregnancy, who did not become a BCBSM employee on November 22, 1993. That was a decision the BCBSM made and implemented. It was solely the decision of the Defendant BCBSM not to process the Plaintiff on that day. Furthermore, it was solely the decision of the Defendant, BCBSM, to not allow the Plaintiff to become an employee after her pregnancy leave. BCBSM did not advise plaintiff that she had to report before March 1, 1994 to maintain her job.

The decision to not allow the Plaintiff to become an employee of the Defendant BCBSM was a decision that was exclusively made and carried out by the Defendant BCBSM and its agents.

There was evidence that the Defendant purposefully did not advise the Plaintiff when the unification took place. There was evidence that they did not return her calls. There was evidence that Defendant purposefully deceived her and told her to take care of herself and her baby. This of conduct is all the more quizzical in light of Plaintiff's excellent job performance..

B. Defendant's Alleged Pretexts of Failure to Hire Due to the Plaintiff Missing her Window of Opportunity and the Medicare Hiring Freeze are Internally Inconsistent and Were Shown to be Mere Pretexts for Unlawful Discrimination.

Defendant, throughout this litigation, had alleged that the Plaintiff was not hired in May 1994 when she came back from her pregnancy leave because there was an alleged Medicare Hiring Freeze going on. Indeed, the Head of the Department of Human Resources for Blue Cross, Joel Gibson, testified at his deposition that it was the "**only reason**" that precluded the re-employment of the Plaintiff. Mr. Gibson was not called by the Defendant at trial. However, in cross examining defendant witnesses Plaintiff's counsel quoted the deposition of Gibson. At that point in time Mr. Feinbaum objected and then admitted on the record that Mr. Gibson did say that but that he basically changed his testimony later in the deposition.[40]

Donald Whitford, the person in charge of the unification, however, has stated that the Medicare hiring freeze had nothing to do with the failure to reinstate the Plaintiff.

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[40]The actual testimony of Gibson was as follows:
"Q. What I'm more interested in than the date, do you remember the reason why she was not allowed to return to work as a rep for Blue Cross Blue Shield in Saginaw?
"A. I believe at the time we were dealing with the Medicare hiring freeze and we couldn't fill any positions
"Q. Is that the only reason
"A. That's the reason

[Gibson 39-40]. While this testimony, *per se*, is not in the record the admission of Mr. Feinbaum is. It is also obvious why the Defendant did not call Mr. Gibson as a witness.

The positions are internally inconsistent. If the reason is that the Plaintiff missed some "window of opportunity", a theory that was never advanced prior to trial, and certainly nothing the plaintiff was ever given notice of either by fax, phone, letter, certified document, or any other means of communication, then the Medicare hiring freeze is irrelevant. However, if the Medicare hiring freeze is the reason that the Defendant could not hire her back then the "window of opportunity " defense was a sham.[41]

It should be further pointed out that no where in any BCBSM policy manual, booklet, or any other formal regulation discusses any "window of opportunity". Rather, the evidence demonstrated that the Plaintiff was offered the position, accepted the position, got pregnant, was told to take care of herself, told not to worry, only later to find out that she allegedly missed some "window of opportunity". A window that was apparently slammed shut, because of pregnancy, by Mr. Whitford and his right hand man Mr. Curdy.

The United States Supreme Court has recently reaffirmed a factfinder's alternatives when faced with evidence that suggests that a defendant's alleged pretext is untruthful. *In Reeves v*

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[41]As the Plaintiff argued in closing argument, both of these defenses cannot be true. Therefore, it is a legitimate inference that neither one of them is true as is indicated by the evidence. If Plaintiff missed her window of opportunity, there was no reason for Mr. Gibson or anyone else to check to see if the job was open or if there was any type of hiring freeze. If she missed this mythical "window of opportunity" all other inquiries were moot. As was previously noted neither the Plaintiff nor the Plaintiff's counsel was ever informed of this "window" almost until the time of trial. The hiring freeze, on the other hand, would not have been relevant if there was this window of opportunity missed. The hiring freeze, moreover, was a red herring. The hiring freeze applied to new hires. The Plaintiff was not a new hire. Therefore, it would not have and should not have applied to the Plaintiff. Moreover, the Plaintiff demonstrated that when the Defendant chose to hire, there were numerous other positions of clerical levels that were filled during this hiring freeze. [Exhibit 54 530b-580b] Indeed, the Defendant's own Exhibits demonstrated numerous non-pregnant disabled individuals who came off of long term disability leave during this alleged hiring freeze. [Exhibit 49 507b-510b]. Once the hiring freeze was eliminated as a valid excuse the Defendant then, at the time of trial, created a new excuse the alleged "window of opportunity". Both of these excuses, however, were merely illegal pretexts for illegal discrimination. Interestingly, the Defendant never provided any explanation to the jury why it would not hire the Plaintiff for the open position after her pregnancy leave was over. That is, one would think that the Defendant who was admittedly necessitous for account representatives would have loved to hired an experience and skilled salesperson.

Sanderson Plubming Products 530 US 133; 120 S Ct 2097; 147 LEd 2d 105 (2000), the Court reinstated a jury verdict after the district court had denied motions for JNOV/New Trial but the 5th Cir. reversed. In dealing with cases where there is some evidence that the alleged pretext may be untruthful the Court explained the 5th Circuit's error and declared:

> "[T]he Court of Appeals misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence. This much is evident from our decision in St. Mary's Honor Center. There we held that the factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff. 509 U.S., at 511, 113 S.Ct. 2742. The ultimate question is whether the employer intentionally discriminated, and proof that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered ***147** reason ... is correct." *Id., at 524, 113 S.Ct. 2742.* In other words, "[i]t is not enough ... to *dis* believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Id., at 519, 113 S.Ct. 2742.*
>
> In reaching this conclusion, however, we reasoned that it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Specifically, we stated:
>
> "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination." *Id., at 511, 113 S.Ct. 2742.*
>
> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. See *id., at 517, 113 S.Ct. 2742* ("[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination"). In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Wright v. West, 505 U.S. 277, 296, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992)*; see also *Wilson v. United States, 162 U.S. 613, 620- 621, 16 S.Ct. 895, 40 L.Ed. 1090 (1896)*; 2 J. Wigmore, Evidence 278(2), p. 133 (J. Chadbourn rev. 1979). Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely ****2109** alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Cf. *Furnco Constr. Corp. v. **148 Waters, 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978)* ("[W]hen all legitimate reasons for rejecting an

applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with *some* reason, based his decision on an impermissible consideration"). Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."

Reeves v Sanderson Plumbing supra 530 US @146-147; 120 S CT @ 2108

The Defendant, as they did at trial, continues to shift position. The cases relied on by the Defendant, in the Court of Appeals, regarding discriminatory intent, have now all been abandoned.[42]

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[42] In the Court of Appeals the Defendant relied on two cases. Defendant cited *Phelps v Yale Security, Inc.*, 986 F.2d 1020 (6th Cir. 1993) *cert den* 114 S Ct 175 (1993); and of *Sattar v. Motorola* 138 F3d 1164(7th Cir. 1997). These cases were thoroughly distinguished in the court of appeals. As has been the Defendant's practice in the course of this litigation, once a defense proves to be untenable, Defendant merely switches to a new defense, or a new case, in the hope that something will absolve them of their legal responsibility. One of those cases cited was *Sattar v. Motorola* 138 F3d 1164(7th Cir. 1997). Defendant cited *Sattar* for the proposition that where a supervisor who has discriminatory animus was not part of the decision making process summary disposition may be appropriate. In this case, however, there is no doubt that the individuals who were demonstrated to have the pregnancy animus were the decision-makers. Indeed, Whitford was the head of the entire unification project. It was further admitted that Curdy was a decision-maker and acted as Whitford's right hand man. Whitford, did not personally know the Plaintiff and relied on Curdy for all of his information regarding her. **It is doctrine of longstanding that where a decision maker is influenced by one who has discriminatory animus, the animus of the supervisor is imputed to the ultimate decision maker.** *Rasheed v Chrysler* 445 Mich 109, 136; 517 NW2d 19 (1994); *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 524-525; 398 NW2d 368 (1986).

The evidence showed that Whitford and Curdy had repeated discussions with Pat Stone immediately after the Plaintiff went out on maternity leave. The purpose of these meetings and discussions were so that they would have a "threat" over her. This is, as acknowledged by Ms. Stone, very unusual. The statements of Mr. Curdy constituted direct evidence of discrimination. This case is nothing like *Sattar, supra.*

The Sixth Circuit decided *Kline v Tennessee Valley Authority* 128 F3d 337 (1997) [decided October 15, 1997]. *Kline supra*, was a case that involved claims pursuant to the ADEA and Title VII. The District Court for the Eastern District of Tennessee entered judgment in favor of the employer. The Sixth Circuit reversed. The Court noted the appropriate standard where it stated:

These cases all being distinguished and now abandoned, created a void for the Defendant-Appellant before this Court. This void is now filled through reliance on yet a new theory and new case. The new case submitted by the Defendant is *Krohn vs Segwick James 244 Mich App 289, 624 NW2d 212 (2001. Krohn supra,* is as akin to this case as day is to night. In *Krohn*, there was **one** remark made by a **non-decision** maker long before the adverse consequence. To make it even less relevant the one statement that was made was ambiguous. In the present case there were not only numerous statements by Curdy, but also statements then by the person he reported to Whitford. There were other affirmative acts of retaliation against the Plaintiff. Both Whitford and Curdy were decision-makers. Much of the retaliation started to occur immediately after they found out Plaintiff was pregnant. Plaintiff was clearly the victim of disparate treatment because of her pregnancy. Moreover, there was no ambiguity in the statements. The *Krohn* case is not even close to the case before this Court .

Certainly, the evidence taken most favorably to the Plaintiff, clearly supports the jury's finding that the Defendant BCBSM violated the ELCRA when it did not hire/transfer the Plaintiff to the payroll of BCBSM with all of its other employees because the Plaintiff was pregnant. The evidence further demonstrated that the Defendant discriminated against the Plaintiff when she made inquiries about returning to work. Defendant purposefully failed to provide the Plaintiff information. Defendant failed to answer phone calls. Defendant failed to

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"The fact finder's disbelief of the reasons put forward by the defendant particularly if disbelief is accompanied by a suspicion of mendacity] may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required." Kline, supra @ 344. footnote omitted].

explain or communicate any alleged "window of opportunity". A window of opportunity that cannot be found in any policy guideline in the Defendant's massive policy books. Defendant discriminated against the Plaintiff when she attempted to return from LTD. Previously all 89 out 89 other employees who had requested to come back to work, and whose jobs were available, were placed back in their respective positions. [See Exhibits 15 & 49.] That was the LTD policy whether one was employed by BCBSM or BCNEM.

2. DEFENDANT DID NOT PROPERLY PLEAD THE AFFIRMATIVE DEFENSE OF FAILURE TO MITIGATE DAMAGES AND, THEREFORE, THE DEFENSE WAS WAIVED AND IS NOT PROPERLY BEFORE THIS COURT.

A. The Failure to Mitigate Damages is an Affirmative Defense that Must be Properly Pled and Proved by the Defendant. The Defendant Failed the First Step of this Burden Because the Defendant did not Properly Plead the Affirmative Defense of Failure to Mitigate Damages. Therefore, the Defense was Waived and is not Properly Preserved for Appeal.

Michigan Court Rule 2.111 governs the rules of pleading including responsive pleadings and affirmative defenses. MCR 2.111 (F)(3) relates to affirmative defenses. It states that:

> "(3) *Affirmative Defenses*: Affirmative defenses **must** be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118. Under a separate and distinct heading a party must state the facts constituting:
> * * *
> (b) a defense that by reason of other affirmative matter seeks to avoid the legal effect of or defeat the claim of the opposing party, in whole or in part." MCR 2.111(F)(3)(b) (Emphasis added).

In the instant case the Defendant, contrary to MCR 2.111, failed to allege an affirmative defense of failure to mitigate in its first responsive pleading. **[See Defendant's Answer to the Plaintiff's Complaint 11a].** Pursuant to MCR 2.111(F)(2) a defense that is not raised is thereafter waived. The Rule explains:

> "(2) *Defenses **Must be Pleaded**; Exceptions.* A party against whom a cause of action has been asserted by complaint, cross claim, counterclaim or third party claim **must** assert in a responsive pleading the defenses the party has against the

claim. A defense not asserted in the responsive pleading **is waived**, except for the defenses of lack of jurisdiction over the subject matter of the action and failure to state a claim on which relief can be granted...."
See MCR 2.111(F)(2). (Emphasis added).

Plaintiff's position is supported by a series of cases. *Booth v University of Michigan*, 93 Mich App 100; 286 NW2d 55 (1979). In *Booth* the court noted that any defense posture which "by reason or other affirmative matter seeks to avoid a legal effect of or defeats a claim set forth in plaintiff's complaint is in the nature of an affirmative defense."

This Court in *Odgen v George Company*, 353 Mich 402 (1958) affirmed the judgment of $40,368 in a breach of contract claim where the defendant had a claim of **mitigation of damages** yet failed to allege the defense in its responsive pleading. The Court noted: "This claim in mitigation of damages was not pleaded by defendant nor did defendant support it by any offer of proofs. The burden of proof in this regard rested upon the defendant."[43]

B. Plaintiff Attempted to Preclude the Defendant From Raising the Defense of Failure to Mitigate Damages at Every Possible Opportunity.

Plaintiff filed a Motion in *Limine* to prevent the Defendant from being allowed to argue the mitigation defense. [See Plaintiff's Motion *in Limine*/Answer to Motion *in Limine* dated March 16, 1998 1b-13b]. Plaintiff argued at the Hearing that "they did not properly plead

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[43] Most recently the Court in *Rasheed v Chrysler*, 445 Mich 109; 517 NW2d 19 (1994) reiterated that the defense of failure to mitigate damages is an affirmative one. *Rasheed, supra*, 445 Mich 109, 124. The Court further explained that, "[a]n affirmative defense presumes liability by definition. [*citing Black's Law Dictionary* (5th Ed) p. 55 Indeed, the Court in *Rasheed* struck Chrysler's statute of limitation defense because it had not been adequately preserved. The Court explained: "**After careful review of the record, we agree with plaintiff that defendants failed to properly raise the defense as it relates to the claim for humiliation damages under the continuing violations doctrine. Thus it is unnecessary for us to address this claim.**" [Rasheed @ 134].

In the instant case the Defendant was aware that the Plaintiff was initially unemployed and then was working for less money at BCNEM. Defendant was apprised of facts that required the Defendant to file an affirmative defense in response to the Plaintiff's Complaint. The failure of

[mitigation]. In a strict interpretation of the rules is indeed **that they waived the defense. And I think that is a waiver.**" [62a].

The Plaintiff's argument through the Motion *in Limine* adequately preserved this issue for appeal. Plaintiff reasserted the defense in answer to the Defendant's Motion for New Trial/JNOV/Remittitur. [61b-62b]. Plaintiff extensively reasserted in its court of appeals brief that the Defendant had failed to properly plead the defense of mitigation and, therefore, should have been precluded from raising it on appeal as it should have been precluded at the trial court. [See Plaintiff's Court of Appeals brief pp. 43-50].

C. As the Prevailing Party, Plaintiff is Entitled to Raise all Defenses on Appeal that were Raised at Trial and, Therefore, Plaintiff was not Required to File a Cross-Appeal to Preserve Its Claim that the Defendant Waived its Affirmative Defense.

Despite the Plaintiff's vigilance in raising its claim that the Defendant waived its affirmative defense at every possible level, The Court of Appeals concluded that the Plaintiff had not properly preserved the issue. Specifically, on page 5 of its Opinion, the Court of Appeals declared that the Plaintiff had not properly preserved its claim that the Defendant failed to properly plead the affirmative defense of failure to mitigate damages because the Plaintiff-Appellee did not file a cross-appeal MCR 7.207. [50a fn 4]. While Plaintiff agrees with the ultimate conclusions of the Court of Appeals, Plaintiff believes that this ruling is erroneous.

The Court of Appeals statement that the Plaintiff failed to preserve its claim that the Defendant failed to properly plead the affirmative defense of mitigation is legally incorrect for a number of reasons. First, the Plaintiff raised and briefed the issue at every level of this litigation. Second, where the issue is central to a claim appealed by the appellant all defenses that arise out of the same nexus may be raised. *People v Gallego* 199 Mich App 566; 502 NW2d 363 (1993).

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the Defendant to raise the defense resulted in a waiver. Therefore, all of the Defendant's arguments regarding mitigation are waived and not preserved for Appeal.

In this case, Defendant argued on appeal that the Plaintiff failed to mitigate damages. Therefore, the Plaintiff, as the Appellee, was entitled to raise all claims that it has previously raised in opposition to that argument. The failure of the Defendant to adequately plead and prove the defense of mitigation of damages has been central to Plaintiff's position throughout. *See, Giannetti Bros v Pontiac* 152 Mich App 648; 394 NW2d 59; *lv app den* 426 Mich 869 (1986). It has long been held that where a plaintiff prevails at trial, but the trial court ruled against the plaintiff on a specific issue, the Plaintiff did not waive raising that issue again in the Court of Appeals where the defendant files its claim of appeal. *See Fass v City of Highland Park*, 321 Mich 156; 32 NW2d 375 [*on reh from* 320 Mich 182, 30 NW2d 828 (1947).

In *Fass, supra*, this Court was faced with a situation where a rehearing was granted because an error had been made on the same issue now raised by the Plaintiff-Appellee. That is, in the initial proceeding in *Fass*, this Court dismissed an issue as not being preserved because the Plaintiff did not file a cross appeal. Identical to the footnote set forth by the Court of Appeals in this case. On *Rehearing*, however, the Court reversed itself. The Court explained:

> "In our former opinion we said: "In coming to our conclusions in this controversy we have in mind that plaintiffs did not file a cross appeal, hence the constitutionality of the zoning ordinance is not an issue in this cause"". We confess error in this statement as an appellee who has taken no cross appeal may urge in support of the judgment in his favor reasons rejected by the trial court" citing *Township of Pontiac v Featherstone*, 319 Mich 382 [29 NW2d 898] and *Morris v Ford Motor Co,* 320 Mich 372; [31 NW2d 89]."*Fass v City of Highland Park*, 321 Mich 156; 32 NW2d 375 (1948).

Every issue raised by the Plaintiff was raised at the trial level via Motion in *Limine,* and has been consistently briefed at every subsequent level. Therefore, Plaintiff respectfully submits that she was not required to file a cross-appeal to preserve this issue.[44]

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[44] This case is very analogous to another case that counsel for the Plaintiff tried involving the issue of mitigation of damages. In 1991, counsel for the Plaintiff tried *Paulitch* v *Detroit Edison*,

3. THE DEFENDANT FAILED TO SATISFY ITS BURDEN OF PROOF THAT THE PLAINTIFF DID NOT MITIGATE DAMAGES BECAUSE THE DEFENDANT FAILED TO DEMONSTRATE THAT THERE WERE COMPARABLE JOBS AVAILABLE TO THE PLAINTIFF AND THAT THE PLAINTIFF FAILED TO USE REASONABLE DILLIGENCE IN OBTAINING COMPARABLE EMPLOYMENT.

The Defendant confuses the concept of the plaintiff's duty to mitigate damages and the respective burden of proof that is on a defendant to prove that a plaintiff has failed to mitigate damages. The duty of mitigation has ancient origins that prevent claimants from recovering damages that could have been avoided through reasonable diligence. *Rasimas v Michigan Department of Health.* 714 F2d 614 (6th Cir 1983). In *Horizon Tube, supra*, however, the court explained that while the duty is the plaintiff's it is the defendant's burden of proof to prove that the plaintiff failed to mitigate. The court explained:

> "**The burden of proving a failure to mitigate damages in an employment discrimination suit is on defendant**. [citations omitted]. To satisfy this burden, defendant must establish (1) that the damage suffered by plaintiff could have been avoided, i.e. that there were suitable positions available which plaintiff could have discovered and for which he was qualified; and (2) that plaintiff failed to use reasonable care and diligence in seeking such a position. [citations omitted]. This test appears to be almost uniformly accepted. We disagree with [defendants] interpretation of "reasonable care and diligence' as meaning that the discharged employee is required to make every effort to find employment. A claimant is required only to make every reasonable effort to mitigate damages and is not held to the highest standard of diligence. [citations omitted].
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> *Department of Civil Rights v Horizon Tube Fabricating Inc.*, 148 Mich App 634, 638 (1986).

More recently this Court in *Morris supra*, affirmed the age-old adage that a plaintiff has a duty to mitigate damages, but that the defense of failure to mitigate damages is an **affirmative**

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208 Mich App 656 (1995). In *Paulitch* there was also an erroneous claim that the Plaintiff had not mitigated his damages. Likewise in *Paulitch*, the Plaintiff had continuously argued that the Defendant had not preserved the issue of mitigation because it was not pled in its first responsive pleading and was therefore waived. The issue of the Defendant's waiver of the mitigation defense is not even mentioned in the court of appeals decision [See 208 Mich App 656 (1995)]. However, it was extensively briefed. This Court then granted leave to appeal. *Paulitch v Detroit Edison* 451 Mich 899 (1996). The issue of mitigation was again substantially briefed and argued before this Court. After oral argument this Court vacated leave. *Paulitch v Detroit Edison* [*Leave Vacated* 453 MI 970 (1996). While one can't be certain for the reason that leave

one in which the burden rests upon the Defendant to prove. *See Morris supra*; *Fothergill v. McKay Press* 374 Mich 138 (1965). The question of whether an employee is reasonable in not seeking or accepting a particular job is a question for the jury. *See Morris supra*; *Hughs v Park Place Motor Inn Inc.*, 180 Mich 213, 220 (1989) *citing* 2 Restatement Agency, 2d §455, comment d, p. 373; Restatement Contracts §336 p.537; 11 Williston, Contracts (3rd ed)§1359, p. 306. A mere showing that more exhaustive measures could have been taken does not suffice. Indeed, the Court in *Morris supra*, explained the rule as follows:

> "A claimant required to make reasonable efforts to mitigate damages is not held to the highest standards of diligence...'[T]he claimant's burden is not onerous, and does not require him to be successful in mitigation."
> *Morris v Clawson Tank Co* 459 Mich 256,; 587 NW2d 253, 257 (1998)

The Court in *Morris* further delineated the substantial burden that the Defendant is faced with in proving the mitigation defense.

> "[T]he **Defendant must show** that the course of conduct plaintiff actually followed was so deficient as to constitute an unreasonable failure to seek employment."
>
> *Morris v. Clawson Tank supra* 587 NW2d 253, 258 [citations omitted, emphasis added].

Standard Jury Instruction 16.01 regarding the meaning of "burden of proof" was read to the jury without objection. To satisfy the "burden of proof" a party must submit evidence that outweighs the evidence against it. [371b-372b]. Standard Jury Instruction 105.41 was also read to the jury. That Jury Instruction unequivocally puts the burden of proof on the Defendant to prove that the Plaintiff did not mitigate damages. [375b].[45] SJI2d 105.41 puts at least four

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was ultimately vacated, one can only presume that the Court was convinced that the issue of mitigation had not been preserved and leave, therefore, was moot.

[45]In *Clawson Tank* this Court specifically explained that the "standard jury instruction properly states this rule of law. The Court further opined that the ultimate decision to determine whether one is reasonable is seeking or accepting employment was for the jury. Moreover, that it was the defendant who bore the burden of showing that the Plaintiff failed to act reasonably. [*See, Morris v. Clawson Tank supra,* 587 NW2d 253, 258 and 258 FN 5,]. That burden could not

separate burdens on the Defendant if they wish to avoid economic damages. If any one of those burdens is not fulfilled a jury can reasonably conclude, as they did in this case, that an injured party acted reasonably in failing to accept or seek a certain job. The four burdens that were put on the Defendant can be delineated as follows:

1. The Defendant must prove that the Plaintiff failed to mitigate her damages;
2. Defendant must show that there were substantially equivalent positions available and that they were comparable to the position that she should have had at BCBSM;
3. In determining whether a job was of a like nature the jury may consider:
    a. The type of work;
    b. The hours worked;
    c. The compensation;
    d. Job security;
    e. The working conditions &
    f. Other conditions of employment.
4. The Defendant had to show that any available job or job offer did not involve discriminatory conditions. [46]

While federal law is not binding on Michigan courts, in civil rights litigation the precedent is often persuasive. The rule in the Sixth Circuit is unequivocal regarding mitigation of damages and the respective burden of proof. The leading Sixth Circuit case is *Rasimas v Michigan Department of Mental Health.* 714 F2d 614 (1983).

Rasimas involved a gender-based claim brought by a former employee of the state Department of Mental Health. The district court had found that the plaintiff failed to mitigate damages because he failed to apply for a non-supervisory position. The 6th Circuit Court of Appeals reversed. The Court noted:

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possibly of been met by the Defendant in the instant case. The Plaintiff testified regarding a plethora of actions that she took to mitigate her damages. She sought numerous positions over seven months, looked through the yellow pages, want ads, and talked to contemporaries. She also testified that all of the comparable work to the job that she use to have at BCNEM, and the job that she should have had at BCBSM required a college degree. When BCBSM posted her former job in 1996, now requiring a college degree, the Defendant submitted no evidence that would have countered the Plaintiff's conclusion that, under this narrow circumstance, the only way to get comparable employment was to go back to school and get her degree.

[46]SJI2d 105.41 specifically instructs it is for the jury to determine whether a Plaintiff was reasonable in accepting any particular employment. Again, there was no objection by the Defendant.

> "The finding that a claimant has exercised reasonable diligence in seeking other suitable employment following a discriminatory discharge is an issue of fact which, on appeal is subject to the "clearly erroneous" standard of Federal R Civ P. 52(a). [citations omitted]. Once a claimant establishes a prima facie case and presents evidence on the issue of damages, the burden of producing sufficient evidence to establish the amount of interim earnings or lack of diligence shifts to the defendant. [citations omitted]. **The Defendant may satisfy his burden only if he establishes that: 1) there were substantially equivalent positions which were available; and 2) the claimant failed to use reasonable care and diligence in seeking such positions."** [Emphasis Added].
>
> *Rasimas* @623-624.

Once the Plaintiff establishes a prima facie case of damages the burden shifts to the Defendant to prove the amount of interim earnings or lack of diligence. *Rasimas v Michigan Department of Mental Health,* 714 F.2d 614, 623 (6th Cir 1983). *Citing NLRB v Reynolds* 399 F.2d 668, 669 (6th Cir 1968)[47].

The *Rasimas* court explained that an individual is not required to accept inferior employment to mitigate damages.[48] Citing the 10th Circuit in *Rutherford v American Bank of Commerce,* 12 Fair Empl Prac Cas (BNA), 1184(DNM 1976) *aff'd* 565 F2d 1162 (10th Cir 1977), the Court explained:

> "[American Bank of Commerce]argues that Rutherford failed to mitigate damages. There is no support for this contention. Her refusal of an offer by Fidelity Bank as a "float" because it took no account of her years of experience and offered only remote possibilities for comparable advancement, does not aid ABC's theory. Nor does ABC suggest any reason why Rutherford should be required to accept inferior employment. In the area of employment contracts comparability of employment status has been deemed more important in some situations than comparability of salary, for example in the context of mitigation.

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[47]*Also See Woolridge v Marlene Industries Corp* 875 F2d 540 (1989 6th Cir) [reversing in part a district court's ruling that required the plaintiff to prove that she mitigated damages. Relying on *Rasimas* the Court noted that it was the Defendant's burden to prove that the plaintiff did not mitigate].

[48]In this case the Plaintiff's acceptance of inferior employment with BCNEM cannot bar a claim for future damages. Plaintiff was not required to accept this position as if was clearly inferior and not comparable in any way to the job that she should have had at BCBSM. Therefore, her resigning from this position, only after it was clearly apparent that she would need a college degree to get her former job or comparable work, cannot cut off her damages. *See infra.*

See WIlliams v Albermarle City Bd of Education, 508 F2d 1242 (4th Cir 1974). Failure of plaintiff to seek reemployment with ABC also does not bar recovery."

Rasimas v Michigan Department of Mental Health, 714 F.2d 614, 624.

The Court in *Rasimas* also held that to be substantially equivalent the position must afford the plaintiff virtually identical promotional opportunities, compensation, job responsibilities and working conditions and status. *Rasimas v Michigan Department of Mental Health,* 714 F.2d 614, 624 (6th Cir 1983). [See SJI 2d 105.41]

Importantly, the Court in *Rasimas* made the distinction between the skilled and unskilled laborer. The reasonableness of the effort to find employment must be evaluated in light of the individual characteristics of the claimant and the job market.[49] *Rasimas v Michigan Department of Mental Health,* 714 F.2d 614, 624 (6th Cir 1983) *citing Stone v D.A. & S. Oil Well Servicing Inc.*, 624 F.2d 142, 144 (10th Cir 1980). The Court in *Morris v Clawson Tank* explained:

> "Determining the 'reasonableness' of a job search is a **fact-laden inquiry** requiring thorough evaluation of, for example, the earnestness of a plaintiff's motivation to find work and the circumstances and conditions surrounding his job search, as well as the results of it. The extent to which a plaintiff continues his job search once he has found employment is simply one of many factors in this fact-laden determination of reasonableness. **Much of this inquiry depends upon determinations of credibility which are far more within the competence of the trial court than within the competence of appellate judges reading dry record**s."

Morris v Clawson Tank supra, 587 NW 2d 253, at 260. [Emphasis Added]

It is, however, only after the Defendant proves that the Plaintiff failed to mitigate damages that the plaintiff is required to submit evidence of reasonable care in seeking employment. Specifically, a claimant is not required to submit evidence of diligence and reasonable care until defendant has met its burden. *Woolridge v Marlene Industries Corp* 875

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[49]In the instant case the Plaintiff had worked for over a decade in the health care field. She sold only health insurance. She had only a high school education. She was very specialized in what she did. She was also very good and successful. The evidence demonstrated that had she been allowed to work at BCBSM, as all other BCNEM employees were allowed, she would have made over $50,000.00 per year working essentially an 8:00 - 5:00 PM job Monday through Friday.

F2d 540, 548 (1989 6th Cir); *Fauser v Memphis Housing Authority* 780 F. Supp 1168, 1177 (WD Tenn 1991).[50]

More Recently, in *Meyers v City of Cincinnati,* the court reached the same conclusion. *Meyers* was a case brought under §1983 but nevertheless involved the same duty to mitigate that arises in a Title VII or an Elliott-Larsen claim. In *Meyer,* the Court explained:

> "In a §1983 case the Plaintiff has a duty to mitigate damages. [citations omitted]. In this case each party contends that the other has the burden on the issue of mitigation, and both parties rely on *Rasimas v Michigan Department of Mental Health*, 714 F2d 614 (6th Circuit 1983). ***Rasimas* unequivocally establishes that once the plaintiff has presented evidence of damages, the defendant has the burden of establishing a failure to properly mitigate.** [citations omitted]....***The City presented no evidence that substantially equivalent positions were available to Meyers and has not, therefore, met its burden of establishing failure to mitigate***.
>
> *Meyers v Cincinnati* 14 F.3d 1115 (6th Cir 1994)[Emphasis added].

A. Defendant Could Not Identify a Single Comparable Available Position Notwithstanding Hiring Two Named Vocational Experts to Investigate the Relevant Regional Economies.

Defendant listed in answers to interrogatories, Exhibit 50 (511b], that it would introduce evidence from a Lawrence Zatkin, M.A., who would testify that Plaintiff failed to mitigate damages and that there was other available comparable work. Mr. Zatkin was unable to identify jobs and was abandoned.

The Defendant, just before trial, named a second vocational expert, Guy Hostetler. Mr. Hostetler was deposed on March 12, 1998. Hosteteler was not called at trial for obvious reasons. Hostetler could not identify a single comparable job that the Plaintiff could have procured. Consequently, the Defendant failed to identify a single job that the Plaintiff could have obtained through reasonable effort that was comparable to the job that she was illegally denied. This was

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[50]In *Fauser v Memphis Housing Authority,* a retaliation case under Title VII, the Court noted, following *Rasimas*, that *it is only after the employer demonstrates that there were equivalent positions and that the Plaintiff failed to exercise reasonable diligence in obtaining them was the Plaintiff required to provide evidence of reasonable care.* 780 F. Supp 1168 (W.D. Tenn 1991).

pointed out to the jury without objection.[51] As the Court noted in *Reetz v Kinsman Marine Transportation Co.* 416, Mich 97, 109 (1982).

> **"It is legitimate to point out that an opposing party failed to produce evidence that it might have, and consequently the jury may draw an inference against the opposing party."**

The Defendant did not, could not, identify one comparable position to the account representative position the Plaintiff should have had at Defendant BCBSM.

B. The Defendant did not prove that the Plaintiff failed to use reasonable effort to get comparable employment.

Contrary to the one-sided and misleading representations of the Defendant, the evidence demonstrated that the Plaintiff undertook a thorough and exhaustive search for comparable work. Indeed, the evidence showed that from May of 1994 through December of 1994, a period of seven months, the Plaintiff used the contacts that she had developed over a decade to determine her marketability and what, if any jobs, were available in the private sector. She talked with people at BCNEM about comparable positions. Her desire was to get back to BCBSM to the job that she was offered and accepted. [157-158a]. However, she also undertook other job searches such as canvassing the yellow pages; calling independent agents and contacting individuals that

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[51] In closing argument counsel for the Plaintiff summarized for the jury as follows: "I spent...seven hours preparing for Mr. Hostetler's testimony to cross examine him. I'm very sorry he's not here. But look what the Defendant has to do. Now, remember, I have the burden to show that discrimination was a reason she did not get the job...They have the burden to show that she didn't mitigate her damages. ..They have to show my client did not cut off her damages. They have no testimony because they did not call Mr. Hostetler...You may consider the type of work. Mrs. Sniecinski sold health insurance. She didn't sell life insurance. She didn't sell other things. She had no interest in those broad lines of insurance. She worked basically a 40 hour week. And you can see that even on Kimberly MacDonald's it says right on the...big blow up: Group 40 4o hours per week. It shows you the compensation. The compensation at BCNEM was 60% of what she would have been making at BCBSM... It's 60% of the pay.....At BCNEM when she finally resigned she told you that she was working side-by-side with the same people. It was very frustrating. It was very humiliating with people that she had outperformed. And now basically she is subordinate to them. And finally when she knew she had no future there they post it with a college education. And when she calls to see if they'll waive it they won't. **So that's the burden to mitigate and the Defendant has not submitted an iota of evidence, let alone carried their burden**. [351b-353b].

she had met in the field. She called and contacted many people. This responsible scenario is contrary to the distorted view that the Defendant tried to give the jury, the court of appeals, and now this Court, that the Plaintiff only made four (4) job contacts after her employment was wrongfully taken from her [159a]. The reference to four specific contacts was examples of individuals and/or businesses that she contacted. These four examples, however, were not an exhaustive list of all people and/or businesses that she contacted. One relevant colloquy, of a number at trial went as follows:

> Q. Mr. Feinbaum said in his opening statement that you only called four people. Is that true?
> "A. **That is not true**
> "Q. You gave him four specific people that you trusted in your deposition?
> "A. **In the deposition he asked me for some examples, and I gave him four examples of agents that I trusted in the market for their opinion.**
> "Q. And you also told him at that time that you went through the yellow pages and a variety of other sources.
> "A. **Yes I did**.
> [Ms. Sniecinski 159a]

Plaintiff explained that selling health insurance was not the same as selling other types of insurance. She had no experience or desire to sell a broad line of insurance that included auto or life insurance. These types of insurance were completely different entities. Agents in the private sector had to work off-hours. They had to work nights and weekends. This did not comport with what she had done for over a decade and it was not something that she desired to do. Private sector agents, who almost exclusively sold broad lines of coverage, worked in excess of 50- 60 hours per week and that there was a very high failure rate. [161a]. Moreover, she had no license for any type of insurance because as a BCNEM representative she worked under the license of Blue Cross. [158a-160a]. It could take years to get fully licensed.[52]

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[52]These were facts that Defendant's named expert Hostetler agreed to in his deposition. More evidence why the Defendant had a change of heart and chose not to call their newly named expert.

These jobs that she discovered were not comparable pursuant to standards set forth in SJI2d 105.41. The Plaintiff testified that there were not comparable jobs without a college education. Other jobs selling insurance involved selling broad lines of insurance that Plaintiff had no experience doing. They involved working weekends and nights. Working many more hours. These jobs are not the least bit comparable to the position that she had at BCBSM. See SJI 105.41.[53]

The Defendant's failures in sustaining its burden of proof on the issue of mitigation were glaring. Specifically, there was no testimony by the Defendant or any witness on the behalf of the Defendant to refute the testimony of the Plaintiff that her job at BCBSM was not comparable to other jobs that were available in the private sector. The differences testified to by the Plaintiff, and never refuted by the Defendant, were the fact that the compensation, job security, hours worked, and the type of work were all substantially different. In the instant action a reasonable fact finder could conclude that a reasonable person would have done exactly what the Plaintiff did in this case.

C. The Job that the Plaintiff Accepted in December 1994 was Substantially Inferior to the Account Representative Position that she should have had at Blue Cross Blue Shield of Michigan and, therefore, the Plaintiff had no Duty to Accept that Position.

It is undisputed that the job that the Plaintiff finally accepted at BCNEM in December 1994 was not the equivalent of the job that she was denied at BCBSM. The job involved only about 60% of the pay of the job at BCBSM and had virtually no advancement opportunities. Plaintiff was not obligated to take this job under any interpretation of the mitigation doctrine as it was not even close to comparable employment.

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[53]In *EEOC v Exxon Shipping* 745 F2d 967 (5th Cir. 1984) it was found being offered a job that required weekend work was not comparable or substantially equivalent o a position that did not require weekend work. This Court in *Morris v Clawson Tank* made clear that any differences between the position that the Plaintiff previously had and any new offer or potential job **raise questions of reasonableness for the jury**. [*Morris v Clawson Tank* 587 NW2d 253, 260 emphasis added].

Defendant does not understand that the plaintiff is not required to take any employment to mitigate. Rather, as the Court in *Morris v Clawson Tank* explained:

> "[T]he like employment test exists largely for the protection of the plaintiff, shielding him from having to accept an unacceptable job in order to preserve his right to a back-pay award.
> *Morris v Clawson Tank* 587 NW2d 253, 259 (1998)

The Plaintiff, testified, however, that she took this inferior position at BNEM with the hope that it would lead her back tot he position at BCBSM. However, when that position was re-posted with the requirement of a college degree, and Blue Cross refused to waive that requirement, Plaintiff acted reasonably in quitting the inferior position at BCNEM.

Since Plaintiff was not required to accept an inferior position, the relinquishment of that inferior position cannot be a basis to cut off the Plaintiff's damages. As the court noted in *Brewster:*

> "An offer by the employer to [hire] ...in [to] a position inferior to that from which he was [fired] cannot be used to minimize damages. It has also been held that if anything has occurred to render further association between the parties offensive or degrading to the employee an offer of further employment by the employer will not diminish the employees recovery if the offer is not accepted"
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> *Brewster v. Martin Marietta* 145 Mich App 641, 663 (1985).

D. The Defendant Cannot Escape the Burden of Proof Regarding the Issue of Mitigation of Damages by Misstating the Plaintiff's Conduct and Wistfully Creating a New Theory that Provides that a Defendant Does Not Have the Burden of Proof Where the Plaintiff Makes No Attempt to Mitigate Damages.

The Defendant, aware of its own shortcomings, makes a half-hearted effort to dodge its legal burdens. For example, in the court of appeals the Defendant stated that it was just "plain silly" to suggest that the Defendant had to show that there were jobs available for the Plaintiff. Defendant went on to say "that it made no difference whether jobs were available Plaintiff had no intention of working". [See Defendant's court of appeals brief p. 44.][54] Defendant further

[54]This statement was and is still disturbing. The Plaintiff had returned to work after each of three problem pregnancies. She not only returned to work in each instance, she

posits that the Plaintiff made no effort to mitigate and, therefore, the Defendant is absolved of its legally imposed duty to demonstrate that the Plaintiff could have gotten comparable work with reasonable effort.

This distorted view of the law is only rivaled by the Defendant's distorted view of the evidence of record in this case. Not surprisingly, the Defendant fails to cite any Michigan or Sixth Circuit support for this view of the law. The cases they do cite are not the least bit analogous to this case or they do not stand for the proposition that is asserted in the brief. See, *Hayes v Shelby Memorial Hospital* 546 F Supp 259 (aff'd 726 F.2d 1543 (11th Cir 1984).

The Defendant cites *Hayes* for the proposition that the plaintiff's failure to mitigate in *Hayes* was similar to the Plaintiff's search in the instant case. The reality of the *Hayes* decision is that the Plaintiff in *Hayes* failed to look for a single job because she assumed no one would hire her because of her pregnancy. However, the federal judge describes the type of search that would be necessary under federal law and precedent in the 11th Circuit. The Court explained:

> "**The plaintiff testified that she did not seek another position because she assumed that any such effort would have been fruitless in light of her pregnancy**. Perhaps the plaintiff's assumption would have been proved correct had she made some effort to seek employment. **No testimony was provided, however, regarding any efforts that could be construed as diligence on her part, such as checking classified ads, registering with employment agencies, or discussing job openings with acquaintances**".
> *Hayes supra* 546 F Supp 259, 266

The claim by the Defendant is that *Hayes* supports their position. Nothing could be further from the truth. Rather, in *Hayes* the Plaintiff failed to look for a single job. The court intimated that if she would have looked for some jobs, gone to employment agencies, look through ads, or talk to acquaintances, much less than the things that the Plaintiff in the instant case did, that she would have met her duty to attempt to mitigate. Furthermore, the Defendant's legal position is at odds

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excelled. She arguably was the best salesperson at BCNEM. It was apparent that she planned on returning to work again in 1994. Indeed, she took an inferior position in an

with the Michigan authority that is on point as well as a vast amount of opinions from the Sixth Circuit as well as sister circuits. Finally, Defendant did not object to the jury instruction.

In *Wolff v Automobile Club of Michigan, 194 Mich App 6; 486 NW2d 75* (1992) a former sales agent brought an age discrimination case against the Auto Club. After being discriminated against the Plaintiff chose to retire. In addition, he had turned down some other offers of employment with the Defendant. **There was no dispute that since his retirement he did not look for any employment.** This, according to the Court, did not necessarily cut-off the Plaintiff's future damages or absolve the Defendant of their legally mandated burden to prove that the Plaintiff failed to mitigate consistent with SJI 2d 105.41. The Court explained:

> "**Although it is undisputed that plaintiff did not seek employment after leaving defendant's employ, the question whether defendant carried its burden of proving plaintiff was unreasonable in not seeking other employment was within the province of the jury.** *citing Hughes v Park Place Motor Inn Inc* 180 Mich App 213, 220 (1989)."
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> *Wolff supra* 194 Mich App 6, 17; 486 NW2d 75, 80-81. [Emphasis added].

The rule has consistently been the same in the Sixth Circuit. The series of cases starting with *Rasimas, supra*, all hold that the Plaintiff is under no obligation to present any evidence on mitigation until the Defendant fulfills its burden of proof and demonstrates that there are comparable jobs available and that the Plaintiff failed to exercise reasonable diligence in obtaining comparable employment. *See, Rasimas v Michigan Department of Health.* 714 F2d 614 (6th Cir 1983); *Fauser v Memphis Housing Authority* 780 F. Supp. 1168 (WD Tenn 1991); *Meyers v Cincinnati* 14 F.3d 1115 (6th Cir 1994); *Wooldridge v Marlene Industries*, 875 F2d 540 (6th Cir 1989).

Wooldridge was a class action brought under Title VII challenging the employer's maternity leave policy. In reversing a denial of back pay, the Court noted as follows:

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attempt to get the position that she should have had.

"It was also error to deny back pay to the entire class based on the special masters doubt that any claimant could have obtained interim employment. ***A claimant is not required to submit evidence of diligence and reasonable care in seeking employment until defendant has met its burden.***" [Citations omitted][Emphasis added]."
Wooldridge supra 875 F2d at 548.

In the instant case, the Defendant did not put forth a scintilla of evidence to demonstrate that comparable jobs existed in the relevant economy. The Defendant failed to put forth any evidence that would show that the Plaintiff did not exercise reasonable effort in obtaining employment if jobs were available.

Defendants in other jurisdictions, facing the same dilemma as Defendant herein, have also become creative in attempting to circumvent their legally mandated burdens. By and large these attempts have been unsuccessful. A Ninth Circuit case that is very similar to the instant case is *Odima v Westin Tuscon Hotel*, 53 F3d 1484 (9th Cir 1995).

Odima involved a race discrimination case. The plaintiff, Odima, was a Nigerian born black man. It clearly appears that an inferior white male was given a job and the company had violated a number of their own policies in giving the job to the white male. Westin argued that the Plaintiff failed to mitigate damages. The court noted:

"Westin next claims that Odima's post trial deposition testimony demonstrates that Odima failed adequately to seek other employment. Title VII "requires the claimant to use reasonable diligence in finding other suitable employment" *citing Ford Motor Co v EEOC*, 458 US 219, 231, 102 S. Ct.3057, 3065; 73 L Ed. 2d 721 (1982). However, Westin has the burden of proving that Odima failed to mitigate his damages. *Sangster v United Airlines Inc.,* 633 F2d 864,868 (9th Cir. 1980), *cert. den* 451 US 971, 101 S Ct 2048, 68 LED 2d 350 (1981). To satisfy this burden, Westin has to prove "that based on undisputed facts in the record, during the time in question there were substantially equivalent jobs available, which the [plaintiff] could have obtained, and that the [plaintiff] failed to use reasonable diligence in seeking one. [Citations omitted and emphasis in the original]. The district court did not abuse its discretion in finding that Westin failed to satisfy the above test.

"***Westin presented no evidence as to the availability of comparable employment. Westin contends that it did not need to present such evidence because "if an employer proves that a plaintiff failed to look for work, the employer is not required to prove that jobs were available" Westin notably cites no Ninth Circuit authority for this purported exception to the general rule and we can find none***. That need not trouble us, however, because Westin fails to satisfy the rule that it urges in any

> event. Odima did not fail to look for work. After leaving the laundry, Odiima sold African artifacts and engaged in day labor. He also applied for an accounting position at Ventana Canyon; he utilized the career placement services of the University of Arizona and Pima Community College; he regularly reviewed the classified ads, and he sent his resume to friends and to his brother who was working in Nigeria with Shell Oil in order to help him find a position.
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> *Odima* 53 F3d 1484,1497[9th Circuit 1995]. [Emphasis Added].

In the instant case the Plaintiff spent seven (7) months, from May 1994 through December 1994, searching for comparable jobs. After that time she came to a few accurate conclusions. First, selling insurance in the private sector was substantially different than selling it at the Defendant and/or its wholly owned subsidiary BCNEM. These differences amounted to substantially different salary, hours, days worked, risks of failures, the types of insurance sold and the licensing procedures. For other more comparable positions the Plaintiff found out that these positions required a college degree. The Defendant can hardly dispute this finding. Their own posting in 1996 required a prospective account representative to have a degree. A requirement that the Defendant refused to waive for the Plaintiff, notwithstanding her outstanding sales record for BCNEM. It would appear reasonable that the Plaintiff would, or certainly reasonably could conclude, that the only way to get comparable employment would be to get a degree.

The law generally does not require a party to do useless acts. No reasonable person could deny that at some point it is fruitless to continue searching for specific employment if one does not possess those credentials that are now required in the market place.[55] Courts have generally taken an equally pragmatic approach. *See Nord v US Steel Corp* (11th Cir 1985).[56] As this Court declared:

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[55]A college degree was not a credential that was always required for an account representative. Few, if any, of the Plaintiff's contemporaries at BCNEM had college degrees. Regardless of degree, the Plaintiff was one of the most successful sales people that BCNEM had. In 1993 all BCNEM employees were transferred over in the unification notwithstanding the lack of a degree. All of these individuals were grandfathered in. All, except the Plaintiff.

[56]*Nord, supra* involved a case that was brought pursuant to Title VII. The Plaintiff in *Nord* alleged that she was discriminated against because of her gender. In *Nord*, the Plaintiff, after looking for work for two years went to school and helped her husband set up a private practice as

"We reiterate that the plaintiff had no obligation to seek "like employment" as defined by the court of appeals. [citations omitted]. **The question whether plaintiff's efforts to mitigate damages were reasonable under the circumstances is one for the trier of fact.**

Morris v Clawson Tank 459 Mich @ 271. [Emphasis Added].

4. PLAINTIFF'S DECISION TO RESIGN FROM AN INFERIOR POSITION AT BCNEM AND GO TO COLLEGE ONLY AFTER DEFENDANT BCBSM POSTED THE ACCOUNT REPRESENTATIVE POSITION WITH THE NEW REQUIREMENT OF A COLLEGE DEGREE WAS REASONABLE IN LIGHT OF HER PRIOR EXHAUSTIVE SEARCH FOR COMPARABLE WORK AND WAS EFFECTIVE AT MITIGATING HER DAMAGES.

Defendant would have this Court believe that there are a number of courts that support its position on this issue. That is not true. Indeed, there is not a single state or circuit that would support the Defendant's position under this fact scenario presented in this case. Defendant's suggestion that the Second Circuit supports their position is clearly wrong and misleading. The decisions in *Dailey v Societe Generale*, 108 F3d 451 (2nd Cir 1997) and *Padila v Metro North Commuter Railroad*, 92 F3d 117 (2nd Cir 1996) certainly support the Plaintiff in this case.

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a psychologist. Prior to helping her husband, Mrs. Nord also testified that she had registered with state employment agencies and filled out some applications with other employers. Defendant argued that the Plaintiff had not mitigated. However, the defendant, as BCBSM herein, failed to submit any evidence to show that there were substantially equivalent jobs or that the Plaintiff failed to exercise reasonable diligence in gaining comparable employment. The Court rejected the Defendant's arguments. The Court explained:

"Here, defendant did not submit any evidence other than plaintiff's testimony to substantiate its claim...Thus, defendant left the determination of plaintiff's diligence to be decided by the court based upon its assessment of the plaintiff's credibility. We do not find that the court erred in ruling in favor of the plaintiff."

* * *

A more difficult issue is presented by the period after the two to two and one half years plaintiff actively searched for employment. **The question before us is whether, after searching unsuccessfully for employment for this period, it was reasonable for plaintiff to turn her attention to setting up a business with her husband which would provide for her future employment. We hold that it was. Plaintiff unsuccessfully searched for a job for years. Rather than continue this fruitless search she sought to establish future employment.** *Nord supra* @ 1471

Defendant relies on *Greenway v Buffalo Hotel* 143 F3d 47 (2nd Cir 1998). *Greenway*, is distinguishable from present case as decided by the Court of Appeal.

The Plaintiff in *Greenway,* was a bartender. That is substantially different position than the Plaintiff who had worked herself up to a position of earning over $50,000.00 per year, including all benefits, with only a high school education at BCBSM. In *Greenway*, the Plaintiff admitted that he had not looked for bartender jobs. In this case the Plaintiff spent almost seven months looking for comparable positions and found that she needed a college degree to obtain them. Others required certain licensures and/or degrees. So, again, this case is vastly different from *Greenway.*

Critically, in *Greenway* the Court was faced with the question where the Plaintiff had made no job search at all was the employer required to come forward and prove jobs. That, again is not the case herein.[57] Indeed, while *Greenway* is very distinguishable from this case, the Second Circuit's decision in *Dailey v Societe Generale,* 108 F3d 451 (2nd Cir 1997), presents a very analogous fact situation to the instant case.

The facts of *Dailey* , are virtually identical to the instant case. Anne Dailey was hired by the defendant bank in 1990 as a vice president and manager. Her starting base salary was $85,000. She received favorable evaluations and bonuses. She received an 8% raise and 18,900 bonus in 1992. Dailey later received a new supervisor and ultimately was terminated. She claimed that it was because of sex discrimination and retaliation.

After Dailey's termination she sought work in a comparable position in New York for **six months**. During that time, like the Plaintiff herein, she did not receive a single offer. With her funds depleted she returned to Pennsylvania and enrolled in a physicians assistant program.

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[57]There are other aspects to consider as well. In *Greenway* the Plaintiff was still awarded $200,000 in punitive damages. Punitive damages are not available under the ELCRA.

Defendant claimed that this violated her duty to mitigate. The Second Circuit disagreed. The Court explained:

> "The District Court observed that, with respect to the first six-months of her job search there was evidence that plaintiff (1) used Defendant's out placement services until they were cut off by the Defendant[58]; (2) contacted many people in the banking industry to obtain leads about job openings; [59](3) used the services of executive recruiters; and (4) interviewed for open positions. *Dailey supra at* 455.

In denying the Defendant's motion for jnov in *Dailey* the district court noted: "*plaintiff presented ample evidence at trial to demonstrate that her decisions to enter school was in accord with her duty to mitigate damages.* The Court in *Daily* also acknowledged the limitations put on a Plaintiff to mitigate her damages. The Court reasoned that an employee need not go into another line of work, accept a demotion, or take a demeaning position. "Furthermore, the claimant's burden is not onerous and does not require him to be successful in mitigation". *Dailey at 456 citing Rasiman v Michigan Department of Health* 714 F2d 614, 624 (1983).[60]

The Court in *Dailey* concluded, "**We believe that a fact-finder may, under certain circumstances, conclude that one who chooses to attend school only when diligent efforts to find work prove fruitless, satisfies his or her duty to mitigate**" *Dailey at* 457. [61]

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[58]Likewise, the Plaintiff immediately contacted Human Resources for possible available jobs. She was ultimately contacted by BCNEM in December 1994 with a position that was inferior to the position she was wrongfully denied.

[59]Plaintiff herein contacted people she had met in the industry for the past decade with no results. She also used the yellow pages and other sources to seek positions.

[60]The Court cited two other cases showing that the Plaintiff in *Dailey*, and herein, attempted to mitigate their respective damages. *See Odima v Westin Tuscon Hotel,* 53 F3d 1484, 1497 (9th Cir 1995)[holding that filing applications, using university's career placement services, reviewing classified ads, and sending out resumes established diligent mitigation]; *Also see, Hanna v American Motors Corp.,* 724 F2d 1300, 1309 (7th Cir 1984)[Finding filing applications, reading classified ads, and discussing employment opportunities with friends to be "more than sufficient to constitute reasonable diligence]. *Dailey at* 456.

[61]The Second Circuit's decision in *Padilla v Metro North Commuter Railroad* (2nd Cir 1996) is also enlightening. *Padilla* was an action under the ADEA. Padilla claimed that he was retaliated against after cooperating in an investigation of his employer in another age discrimination case. Jury returned a verdict for Padilla. Padilla had a very specialized job for the railroad. Defendant

This is, essentially, the well reasoned approach adopted by the Court of Appeals below. *See*, Court of Appeals decision (49a). Since the publication of *Dailey, supra*, virtually every Circuit that has decided the issue has ruled in accordance with *Dailey*.

The Fourth Circuit was recently faced with back to college issue in *Miller v ATT*, 250 F3d 820 (4th Cir 2001). Like the Defendant herein, A T & T argued that the plaintiff had failed to mitigate her damages. Specifically, the Court framed the issue as A T & T claimed that Miller's decision to forego her search for employment and become a full-time student is inconsistent with the duty to mitigate. *See Miller supra* @ 838. The district court, like Judge Batanni, disagreed. The Fourth Circuit affirmed holding:

> "We conclude that Miller did not fail to mitigate her damages. The central question a court must consider when deciding when a student-claimant has mitigated her

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unsuccessfully argued that plaintiff's future damages should have been cut-off because Padilla failed to mitigate. The Court explained:

> Metro-North argues that Padilla's efforts at mitigation were insufficient because he failed to look for a position that was comparable to his former position as superintendent of train operations and instead simply remained at Metro North as a train dispatcher. **However, Metro-North bore the burden of showing that comparable positions were available for Padilla. [citations omitted]. Metro-North failed to provide any evidence that suitable work existed for Padilla, who had only a high school education and had worked solely for the railroads since the age of 22.** In view of the absence of evidence that suitable work existed for him and in view of his unique and narrow work qualifications, Padilla's failure to attempt to find a position comparable to that of superintendent of train operations did not constitute a failure to mitigate his damages. Moreover, given the lack of evidence of other opportunities available to Padilla, his decision to assume the position of train dispatcher at Metro North after his demotion was reasonable mitigation. Accordingly, even though Padilla did not actively seek alternate employment, he acted reasonably in mitigating his damages.

The Court in *Padilla* affirmed an award of front pay for approximately 23 years. In the instant case the Plaintiff, in her economic calculations, assumed that she would have her degree in four years thereby wiping out any future damages after that time. These were very conservative estimates in light of the fact that if the Plaintiff would have worked in the position that she should have had with the Defendant she would have been earning over $50,000.00 per year by 2000.

damages is whether an individual's furtherance of her education is inconsistent with her responsibility to use reasonable diligence in finding other suitable employment"

Miller, supra @ 838 *citing Dailey v Societe General supra* @ 456-457.

The issue for the jury, that was decided in favor of the plaintiff, was whether after a seven month search and over a decade of experience in the market, was the Plaintiff reasonable in leaving an inferior position and seeking a college education after she was advised that the position that she wanted at BCBSM required such a degree. Also, based upon her phone calls in the prior seven-month period she was told she needed a degree and/or license. Defendant never submitted any evidence to show that the Plaintiff was unreasonable. Defendant never submitted any evidence that discounted or disputed the Plaintiff's testimony. Defendant never identified a single job that was comparable to the position that the Plaintiff should have had at BCBSM and that the Plaintiff could have obtained with reasonable effort. Therefore, the jury correctly concluded that the Plaintiff was entitled to damages as awarded.

The Court of Appeals did, addressed the Defendant's claims and properly concluded:

"A decision to attend school only when diligent efforts to find work prove fruitless, however, or to continue to search for work even while enrolled in school, does meet the duty. See e.g., *Smith v American Service Co,* 796 F2d 1430, 1431-1432 (CA 11, 1986), *Hanna, supra,* 1307-09, and Brady *v Thurston Motor Lines, Inc,* 753 F2D 1269, 1274-1275 (CA 4, 1985).

We find that the evidence supports a finding that plaintiff attended school as a means to acquire marketable skills to enter a particular labor pool, as opposed to simply abandoning the job market, as defendant claims. In other words, there was no evidence presented that plaintiff's decision to become a full-time student to obtain a bachelor's degree was undertaken for the purpose of reaping greater future earnings than she would have earned as an AR in the health insurance industry. Plaintiff testified that when she searched for a comparable job for seven months in 1994, all of the comparable positions required a bachelor's degree or an insurance license, neither of which she had. In the interim of 1994 and 1996, she accepted an inferior position with BCN in the same field, in the health field. Indeed, when BCBSM posted for the AR position in August 1996, it, too, required a bachelor's degree. Thus, the jury could have concluded that plaintiff's decision to quit the lower paying job at BCN, which was a non-marketing position in the health field, with plans to attend school full time was not motivated by a desire to obtain access to an industry with greater compensation, but to ultimately find a job comparable to the AR position. Therefore, the trial court did not err in denying defendant's motion for JNOV or remittitur with regard to this issue.

[Court of Appeals Decision 3/9/01 pp. 49-50a].

A. Plaintiff's Decision to go Back to School Reduced her Economic Damages from $436,212.69 to $261,180.26, Thereby Effectively Mitigating her Damages.

Counsel for the Plaintiff has challenged the Defendant at every stage of this litigation, including oral argument in front of the court of appeals, to explain how, in the Defendant's view, the Plaintiff failed to mitigate her damages when the course that she took resulted in economic damages that were approximately two-thirds of the damages that she would have incurred if she followed the course that the Defendant suggests that she should have taken [$261,180.26, in damages compared to damages of $436,212.69 if she followed the tact insisted upon by the defendant]. Not surprisingly, in the Appellant's Rebuttal in front of the Court of Appeals, there was not any oral response to the Plaintiff's challenge. Plaintiff has been no more enlightened by reading the Defendant's brief to this Court. Defendant BCBSM remains silent and does not even attempt to explain the anomalous position that they urge that this Court adopt. Silence is their only alternative, as any attempt to explain their position, will only appear to be folly.

In December 1994, after being wrongfully denied the account representative position at BCBSM, the Plaintiff accepted inferior employment at BCNEM. After it was apparent, based on the Defendant's subsequent job posting and the plaintiff's follow-up inquiry, that she had no hope of getting the account representative position, she quit the inferior position at BCNEM with the intent of going back to college to get her degree.

Defendant apparently contends that the Plaintiff should have remained at BCNEM. If the Plaintiff did what the Defendant urges her damages, according to the expert testimony of Professor Calvin Hoerneman, Plaintiff's damages would have been $436.212.69. [385b].

For purposes of trial, the Plaintiff liberally presumed that if she returned to school that she could have a degree and find fully comparable work within four years. Therefore, under this analysis, Plaintiff's damages ran only through the year 2000 and amounted to $261,180.26. [386b].

Defendant is, therefore, in the anomalous position of arguing that the Plaintiff should have taken a path that would have essentially raised her economic damages by 67%. [$436,.212.69/$261,180.26 =1.67].

Defendant has argued that the Plaintiff was not taking enough classes to graduate in four years. As the Court of Appeals noted, the date of her ultimate graduation is "irrelevant because the Plaintiff's damages were based on four years, i.e. the time it should take a full-time student to obtain a bachelor's degree. [Court of Appeals decision p. 50a fn 3].

What the Plaintiff did in this case was reasonable and mitigated her damages to the best of her ability. The Defendant's insistence that the Plaintiff was required to stay at an inferior position at BCNEM would have resulted in damages of $436,000.00 compared to the $261,000.00 that the jury awarded. [62] The Plaintiff's conduct was reasonable under any objective standard. More importantly, after going through the vast "fact-laden inquiry" that took over a

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[62] Defendant misleads the Court when it states that economic damages are cut-off if an individual voluntarily quits his or her employment. What the Defendant fails to state, was that the job that the Plaintiff resigned from was clearly inferior to the job that she should have had at BCBSM. As the job was inferior she had no obligation to accept the employment. Because she had no obligation to accept. the inferior position she is likewise not penalized for resigning from that same position when it appears it will not result in comparable employment. Moreover, Defendant, like a civil contempt prisoner, was at all times in possession to the keys to its jail, or bank as the case may be. The Defendant could have offered the Plaintiff the job that she should of had. Had they done this, the burden would have shifted to the Plaintiff to demonstrate why this would not cut off her damages. Moreover, the Defendant could have allowed the Plaintiff to return to her former position when she subsequently applied but did not have the requisite college education that was newly required in 1996. It is the Defendant who consistently makes arguments that are only half-truths and substantially ignore germane facts of the underlying case.

week and over a hundred exhibits that was the unanimous decision of a very astute and educated jury. There is no legal basis to overturn that decision.

5. THE JURY'S UNANIMOUS DECISION TO AWARD $90,000.00 FOR MENTAL ANGUISH, EMBARRASSMENT AND HUMILIATION WAS THE RESULT OF AMPLE AND UNREFTUED TESTIMONY OF THE PLAINTIFF, THERE IS NO EVIDENCE THAT THE VERDICT WAS BASED ON SYMPATHY, PARTIALITY, PREJUDICE, PASSION OR CORRUPTION, AND THEREFORE THE DECISION OF THE TRIAL COURT TO DENY REMITTITUR WAS NOT AN ABUSE OF DISCRETION.

A. This Court reviews a trial court's decision regarding remittitur for an abuse of discretion. Appellate courts defer to a trial court's decision regarding remittitur because of the trial court's superior ability to view the evidence and evaluate the credibility of the witnesses and remittitur should be granted only with great restraint when the award exceeds the highest amount the evidence will support.

Defendant argues that the jury award of $90,000 for non-economic damages was reversibly excessive, despite the unrefuted evidence that the Defendant's illegal and intentional conduct had the effect of vitiating the Plaintiff's past, stripping her of a future that she earned and costing her hundreds of thousands of dollars in earnings. Specifically, Plaintiff testified that felt that she had been stripped of what she had earned through more than a decade of hard work and that they had "taken her future away from her". [172a-173a]. At that point she decided she was not going to be humiliated anymore and she had had enough. She explained that "it was the straw that broke the camel's back. I worked hard to get where I was. I deserved it. I earned it. And I'd had enough. I wasn't going to go through the humiliation anymore. [173a].

It is well settled that the judicial power of remittitur should be exercised with restraint. *Hines v. Grand Trunk W R Co, 151 Mich.App 585, 595;* 391 NW2d 750 (1985). This Court reviews a trial court's denial of a motion for additur and remittitur for an abuse of discretion.

Henry v City of Detroit, 234 Mich App 405, 594 NW2d 107 (1999) An appellate court should defer to a trial court's decision regarding remittitur because of the trial court's superior ability to view the evidence and evaluate the credibility of the witnesses. *Phillips v. Deihm, 213 Mich.App 389, 404;* 541 NW2d 566 (1995); *Henry v City of Detroit*, 234 Mich App 405, 5**94 NW2d 107 (1999).** This Court has defined an abuse of discretion as follows:

> In view of the frequency with which cases are reaching this Court assailing the exercise of a trial court's discretion as an abuse thereof, we deem it pertinent to make certain observations with respect thereto in the interests of saving expense to the litigants and avoiding delay in reaching final adjudication on the merits. **Where, as here, the exercise of discretion turns upon a factual determination made by the trier of the facts, an abuse of discretion involves far more than a difference in judicial opinion between the trial and appellate courts. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.**
> *Spalding v Spalding* 355 Mich 382; 94 NW2d 810 (1959).[63] [Emphasis added].

An abuse of discretion will be found only if an unbiased person would say that there was no justification or excuse for the ruling made, considering the facts on which the trial court acted.

In this case the Defendant-Appellant has never claimed that the verdict was secured by improper methods prejudice or sympathy. The Defendant has merely argued that it does not feel that her testimony supported the verdict. Essentially, that the verdict was just "too much".

Defendant's position is condensed by Judge Battani when she denied the Defendant's Motions for JNOV, New Trial and Remittitur. In denying the Defendant's request to remit front pay and emotional distress damages Judge Battani declared:

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[63] *Spalding* has been repeatedly cited by this Court and lower courts in this state as an example of the abuse of discretion standard. *Fletcher v. Fletcher*, 526 N.W.2d 889, 893, 447 Mich. 871, 879 (1994); *Dacon v. Transue, 441 Mich. 315, 329, 490 N.W.2d 369 (1992); Marrs v. Bd. of*

> "I think front pay is nothing more than extending that pay from 1996 September to the date of trial as I just indicated and in the future. I think that it's basically the same issue **and the jury believed her testimony in terms of her looking and the reasonableness of her damages.**
> So—**I mean, I know you don't agree with the compensatory damages, but that was a jury determination and the Court is not going to interfere with it.**" Hearing held May 29, 1998 83b-84b [Emphasis Added].

There was no palpable abuse of discretion in this case. The decision of Judge Battani to deny the Defendant's motion for remittitur/new trial should not be altered. See,*Teller v George*, 361 Mich 118, 104 NW2d 918 (1960) *Graeger v Hager*, 275 Mich 363, 266 NW2d 382 (1936).

> B. Almost one-hundred years of *stare decisis* mandates that the authority to measure emotional distress, pain and suffering rests with the jury, that the amount of damages in these cases are not subject to exact mathematical calculations and that the Court should not substitute its judgment for that of the trier of fact.

It is a doctrine of longstanding that that the authority to measure damages for pain and suffering rests with the jury. *Kelly v Builder's Square, Inc* 465 Mich 29, 632 N.W. 2d 912 (2001) *citing Griggs v Saginaw* & F.R.Co. 196 Mich 258, 162 NW 960 (1917); The adequacy of the amount of a verdict is also generally a matter for the jury. This Court has stated that an appellate court does not substitute its judgment on the question of pain, suffering, and emotional distress unless a verdict has been secured by improper methods, prejudice, or sympathy." *Kelly v Builder's Square, Inc* supra, 35,) *citing Michaels v Smith*, 240 Mich 671, 216 NW 413 (1927).

The Defendant is urging this Court to abandon one-hundred (100) or more years of *stare decisis* because they don't like the decision. The Defendant wants the Court to legislate a judicial law that looks to how many lines of testimony are submitted by a given party, how many witnesses, or how many experts are involved regarding a certain issue to determine damages. This suggestion by the Defendant attempts to usurp the jury's well-established role as a fact-

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Medicine, 422 Mich. 688, 694, 375 N.W.2d 321 (1985); *Wendel v. Swanberg, 384 Mich. 468,*

finder, vitiating the jury's well established ability to draw reasonable inferences from testimony and other established facts. *See Kelly v Builder's Square supra*; *Brown v Arnold* 303 Mich 616, 6 N.W. 2d 914 (1942). This is not the law, has never been the law, and would usurp the Plaintiff's right to a trial by jury that is guaranteed by both the US Constitution and the Michigan Constitutions. *See U.S. Constitution Amend VII.*

Contrary to the cookie cutter mold the Defendant would like this Court to adopt, this Court has repeatedly reiterated that :

> " ...[T]he amount of damages is not subject to exact mathematical calculation. Primarily the question is for the jury and we cannot arbitrarily substitute our judgment for that of the triers of the facts. That would be to usurp the functions of the jury."
> *Moore v Spangler,* 401 Mich 360, 378 (1977).
>
> Recently this Court reaffirmed this well established legal maxim.
>
> "The law furnishes no exact rule by which damages for pain and suffering can be measured. Their determination must necessarily be left to the good sense and sound judgment of the jury in their view of the evidence. It has frequently been said by courts and text writers that the award of the jury will not be disturbed unless it is so great as to shock the judicial conscience or unless it was induced by something outside of the evidence, such as passion or prejudice." *Kelly, supra* @35.

In the treatise, Michigan Law of Damages, N.O. Stockmeyer, Jr., lists numerous factors that can be considered in justifying emotional distress damages. In reviewing the factors it is evident that Ms. Sniecinski demonstrated that, 1) the conduct of the Defendant had been grossly outrageous; 2) that she was personally embarrassed, 3) that she had been embarrassed in front of other employees, and 4) she had lost hundreds of thousands of dollars as the result of the Defendant's conduct. Equally critical, Ms. Sniecinski had demonstrated that her professional life had been taken from her. See, Michigan Law of Damages (supra), §9.9, pp. 9-8 to 9-9.

475-476, 185 N.W.2d 348 (1971).

The testimony of those lost years, the requirement that she abandon her life long trade and return to school in mid-life, when she has a family, are the types of testimony and damages that are uniquely determined by the jury. The jury and the trial judge evaluates the demeanor of the Plaintiff, her emotion, her tears, and can also draw conclusions and make reasonable inferences from what they observe and hear not only of the Plaintiff but of all witnesses. The jury decides who to believe, who is credible, and who has legitimately suffered emotional distress, humiliation, and the like. As this Court succinctly noted in *Kelly, supra*, **"In short, the jury is free to credit or discredit any testimony**." [Emphasis added].

Judge Battani correctly instructed the jury on emotional distress damages without objection from the defendant. Judge Battani instructed the Jury as follows:

> "Which, if any of these elements of damage has been proved is for **you** to decide based upon evidence and not upon speculation, guess or conjecture. The amount of money to be awarded for certain of these elements of damage cannot be proved in a precise dollar amount. **The law leaves such amount to your sound judgment**"[64] [374b Emphasis added].

This Court has declared that the purpose of the ELCRA is to eradicate discrimination and to make individuals whole for injuries suffered as a result of unlawful discrimination. *Dept of Civil Rights ex rel Cornell v Sparrow Hospital*, 423 Mich 548, 564 (1985). It has been noted that, "[*O]ne can easily imagine that some of the most damaging aspects of discrimination affect the person suffering the discrimination rather than his or her pocketbook...*" Michigan Law of Damages (2d ed), Professor N.O. Stockmeyer Jr., *supra* §9.9, pp. 9-7 to 9-8.

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[64] Defendant did not object to the instruction.

In the instant case that "personal" loss involved the eradication of a lifetime's work as a medical-insurance professional.[65] A profession that the Plaintiff had devoted her entire adult life to learning and performing in an extremely competent and professional manner. After devoting her life to this endeavor, the plaintiff's realization that she was not going to be able to do it anymore is, in and of itself, easily worth the $90,000 that the jury awarded for emotional distresss. The Court of Appeals noted that "her entire future had been stripped away". [50a]. It is doubtful that anyone would question the emotional damage award in the instant case if the case involved an attorney, physician or other professional. Stated another way, if an attorney or physician was stripped of their ability to perform their profession after devoting 13 years to the acquisition of the requisite education, experience, and the cultivation of a clientele, no one would suggest that $90,000.00 was excessive emotional compensation for the claimed loss. Viewed in another context, Mrs. Sniecinski was awarded approximately $6,000 for each year that she invested at Defendant BCBSM and its predecessors. Little more than a hundred ($100) dollars a week. It was not an abuse of discretion to deny Defendant's Motion for Remittitur.

C. The award of $90,000.00 is reasonable when compared to other awards in similar cases and the trial court properly deferred to the jury and denied the Defendant's Motion for Remittitur.

Remittitur can only be granted if the award is greater than the "highest amount the evidence will support". See MCR 2.611 (E)(1) and *Palenkas v Beaumont Hospital*, 432 Mich 527 (1989). This jury, made up of numerous professionals including a physician and computer programmer, concluded that the proofs at trial justified an award of $90,000.00. This award, when compared to others is very conservative, and understated if anything.[66] That is, this is a

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[65] The Plaintiff explained the vast differences between a medical-insurance sales professional and other type of general insurance agents. The Defendant failed to come forward with a scintilla of evidence to dispute the Plaintiff's testimony.

[66] Defendant argues that the award was four times her income at BCN. [See Defendant's Brief p. 40]. First, the relevant number to use for annual income would have been closer to $50,000.00 which is the value of the economic package she would have had at BCBSM but for their intentional discrimination. Therefore, the award is less than two years of income. However, the Defendant misses the entire point of the Plaintiff's testimony that she had her future and past

nominal verdict when compared to other verdicts in comparable cases. See *Jenkins v American Red Cross,* 141 Mich App 785 (1985) [holding an award of $500,000.00 for noneconomic damages not excessive where Defendants have failed to assert facts which suggest any impropriety or prejudice on the part of the Jury. *Jenkins, supra, pp 798-799*].

A case that is analogous to the instant case, tried by Plaintiff's counsel, and argued before this Court, is *Paulitch v Detroit Edison,* 208 Mich App 656, (1995); *lv granted* 451 Mich 899; *lv vacated* 453 Mich 970 (1997). *Paulitch* involved an individual who devoted his entire professional life to a corporation only to have his ultimate goal stripped away as a result of unlawful age discrimination. Mr. Paulitch's dream of reaching a certain position was denied because of his age. In *Paulitch* the plaintiff never sought psychiatric counseling. Moreover, his testimony would only have taken a matter of a couple of pages on the issue. Nevertheless, Mr. Paulitch was awarded $150,000 in emotional distress damages. The court in *Paulitch* when faced with the same claims made by Defendant herein, declared as follows:

> "Because evidence of emotional damage was presented at trial, and the award was comparable to awards in similar cases, the trial court properly deferred to the jury and denied defendant's motion[67]. *Paulitch 208 Mich App 656, 658 citing Brunson v. E & L Transport Co., 177 Mich.App. 95, 106, 441 N.W.2d 48 (1989) Palenkas v. Beaumont Hosp., 432 Mich. 527, 532, 443 N.W.2d 354 (1989)*

Likewise, in *Brunson v E & L Transport Company* 177 Mich App, 441 NW2d 48 (1989) the court was faced with the award of $80,000.00 in emotional distress damages in a sexual discrimination case. In rejecting the defendant's claim in that case the court of appeals declared:

> "We do not substitute our judgment for that of the jury unless the verdict was secured by improper methods, prejudice, or sympathy, or where it is so excessive as

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taken away. She had lost over 13 years of hard work. She had slowly worked her way up the corporate ladder with only a high school degree. It does not take a great deal of testimony to explain that loss, nor do you have to be a rocket scientist to understand it.

[67] Oral argument was heard by this Court in *Paulitch*. However, after the parties concluded oral argument the Leave to Appeal was vacated. It is hypothesized that the reason Leave was vacated is because the Defendant in *Paulitch* also failed to properly raise and plead the affirmative defense of mitigation. Therefore, in *Paulitch* that main issue was not preserved.

to shock the conscience. Further, where a verdict is within the range of the evidence produced at trial, it should not be reversed as excessive. It is well established that victims of discrimination may recover for the humiliation, embarrassment, disappointment and other forms of mental anguish which result from the discrimination. In the within case plaintiff testified that she was very upset after the treatment she received on each road test, that her distress had put strains on her marriage, and that she was treated by her physician and received medication for her nerves. The evidence to support these results may be found in the long history and obvious patter of gender discrimination practiced upon the plaintiff by defendant. Under the circumstances of this case, medical testimony substantiating plaintiff's claim was not required. We do not believe the jury's award was excessive in this case"[68] *Brunson supra* @ 106 [citations omitted].

There being evidence of such damages, the amount to be awarded for noneconomic loss was clearly a question for the jury. As the court of appeals correctly explained:

"Emotional distress damages are among the broad range of remedies available under the civil rights act. *Hyde v University of Michigan Regents*, 226 Mich App 511, 522; 575 NW2d 36 (1997). "Here, Plaintiff testified that she was humiliated and upset about returning to BCN in an inferior position. She explained that she was working side-by-side with people she had worked with for years and outperformed, but was making 50% less money and was in an inferior position. Plaintiff indicated that her co-workers asked questions about why she did not get the job at BCBSM, which greatly upset and humiliated her. She also testified that her entire future had been stripped away. We believe that the evidence was sufficient to support plaintiff's claim of emotional distress"
[Court of Appeals Decision dated 3/9/01 p. 50a]

The Court of Appeals correctly determined that the decision of the jury in this case was supported and should be respected. There is no evidence that the verdict was secured by improper methods, prejudice, or sympathy. It is clearly within the range of what is reasonable. Most critically, it cannot be said that the trial court abused its discretion in denying the Defendant's motion for remittitur.

D. Defendant aware that it cannot prevail under the present state of the law urges that this Court should unilaterally judicially legislate a new jury instruction that

[68] This has been the holding in virtually every single civil rights case to date. Indeed, the defendant cannot cite an analogous case where an award of $90,000.00 has been reduced or reversed. The only cases that the defendant can cite in support of its novel theory, that would result in a dramatic departure in Michigan civil rights litigation, are *Vachon v Tororovich* 356 Mich 182, 97 N.W. 122 (1959) and *Wistkotoni v Michigan National Bank-West* 716 F2d 378 (1983).

requires that emotional distress can only be awarded where the Plaintiff presents definite and specific evidence of emotional distress.

Plaintiff did produced clear, definite and specific evidence of emotional distress. One does not have to be a rocket scientist to understand the Plaintiff's loss. It is not complex. An expert is not needed to explain the loss.

Defendant suggests that this Court adopt new language, that is no more specific or definite than the jury instruction that was read to this jury and, of course, not objected to by the Defendant. As Justice Potter Stewart once explained of pornography, it is easier to know it when you see it than it is to define. The same can be said of what constitutes and justifies emotional distress damages.

Defendant urges that this Court adopt a standard that the Court has previously explained does not exist. That is, emotional distress damages, by their very nature, cannot be measured by an exact rule. Their determination must be left to the good sense and sound judgment of the jury in their view of the evidence. *Kelly v Builders Square* supra @ 35, 632 *citing Sebring v Mawby*, 251 Mich 628 , 232 NW 194 (1930). By necessity, what evidence is definitive and specific enough will by decided on a case by case basis. This Court has made clear that juries are allowed to make reasonable inferences from testimony and draw on their own experience.

Defendant did not object to the jury instruction 105.41 as to the jury applying that instruction to award emotional distress. After the Defendant acquiesced to the jury instruction, and lost, the Defendant asserts for the first time that the instruction is not specific enough.

It has been repeatedly stated that a party may not assign as error on appeal something which his own counsel deemed proper at the time of trial. A party may not harbor error as an appellate parachute. *Lasser v George*, 2002 1462904 (decided July 2, 2002) *citing Dresselhouse v Chrysler* 177 Mich App 470, 442 NW2d 705 (1989). The Defendant had no problem with the

wording of the jury instruction at the time of trial. Moreover, the vast majority of the newly cited cases by the Defendant predated the trial and all of their appeals.

Of all the new cases cited by the Defendant only two are Michigan cases and none of the federal cases are from the Sixth Circuit. The first case is *Wiskotoni v Michigan Nat'l Bank-West*, 716 F2d 378, 389 (6th Cir 1983). In *Wiskotoni* the court relied on *Vachon v Todorovich*, 356 Mich 182 (1959). The *Vachon* case is not in the least bit applicable to this case. Vachon sought damages for shock and aggravation of a nervous condition from a motor vehicle accident. The Court in *Vachon* found that the plaintiff offered "**no proof**" in support of the claims except the accident "aggravated it more" and that she had had feelings which culminated in crying spells. The Court in *Wiskotoni* then relied on *Vachon*. However, a careful reading of *Wiskotoni* will uncover that the Court in that case, which was a public policy violation that is more akin to this case, allowed damages for $25,000.00 for loss of professional reputation. *Wiskotoni* only testified that he felt unwanted. Nevertheless, the Court still allowed the $25,000.00 award to stand. Cetainly, when adjusted for inflation, *Wiskotoni* provides a much greater award than $90,000.00 herein. There is no evidence that there was an abuse of discretion of the trial court. to deny Defendant's Remittitur Motion. Absent that, reversal on denial of a motion of remittitur is not allowed.[69]

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[69] All of the Defendant-Appellant's new citations involve claims regarding procedural due process. This is a new issue that was never raised before. Each case involves claims for compensatory damages that allegedly flowed from the denial of procedural due process. These cases all follow the U.S. Supreme Court's decision in *Carey v Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L. Ed. 2d 252 (1978). Indeed, the *Carey* Court notes that cases dealing with the awards of damages for injuries caused by the deprivation of constitutional rights other than the right to procedural due process, are not controlling in this case. Moreover, the only holding that *Carey* stands for is that **damages cannot be presumed**. *See Carey supra* @ 248. In *Carey* the students who were allegedly denied their due process "**put no evidence in the record to qualify their damages**" Carey @ 251. The whole issue revolved around prior rulings that assumed substantial non punitive damages where procedural due process had been denied. *See Carey* @

252. These procedural due process issues are out of context in the instant case. Moreover, in this case the testimony of the Plaintiff provided actual proof of the injury as found by the jury, Judge Battani, and the Court of Appeals.

The other cases cited by the Defendant are just not analogous or applicable to the one presently before the Court. *Spence v Board of Education* , 806 F2d 1198 (3rd Cir 1986) supports the Plaintiff-Appellee's position. In *Spence*, an art teacher had been transferred from high school to an elementary school for reasons that she believed constituted retaliation for exercising her First Amendment rights. A trial was held and Spence was awarded $25,000.00 in compensatory damages and $3,000.00 in punitive damages. The district court then granted remittitur. In this case, Judge Battani, now a federal judge, specifically rejected the Defendant's motion for remittitur. Moreover, the multi-prong test used in *Spence* supports the Plaintiff's verdict in this case. In *Spence* the Third Circuit considered (1) The Plaintiffs loss of income [in this case there was massive amounts of money lost as a result of the Defendant BCBSM intentional discrimination; and (2) Plaintiff suffered the loss of esteem or her peers and was embarrassed by having to work side by side those people she had outworked and outperformed for about half the compensation. *See Spence* 806 F2d @1201.

Likewise, the Fourth Circuit opinion in *Price v City of Charlotte*, 93 F3d 1241 (4th Cir. 1996) is inapplicable because the **trial court granted remittitur**. Under the prevailing law it is presumed that the trial court is in the best position to evaluate whether a verdict is excessive and both only review for an abuse of discretion. There was no such abuse in this case.

The Fifth Circuit case cited by Defendant, *Brady v Fort Bend County*, 145 F3d 691 (5th Cir 1998) is totally inapposite to the present case. It involved a claim under §1983 of 42 USC. It again involved constitutional issues Finally, the trial court disallowed the emotional distress damages.

Sixth Circuit cases, totally ignored by the Defendant, are also supportive. *Moody v Pepsi Cola Metropolitan Bottling Co* 915 F2d 201 (6th Cir 1990). *Moody* involved an action for age discrimination. In *Moody* the plaintiff testified that he was shocked and humiliated and had to move away from his family to get employment. Plaintiff was awarded $150,000.00 in emotional distress damages. Pepsi argued that the award should have been reversed and/or remitted relying on the very cases Defendant has chosen to rely on in this case. The court noted that neither party explained whether federal or state law should be used. The Court declared that: "**We need not decide which law to apply since both federal and Michigan Courts recognize that the trial court is in the best position to evaluate whether a verdict is excessive and both only review for an abuse of discretion.**" *See Moody supra*@ fn4. The Court held that there was sufficient testimony to justify the verdict. *Also see Turic v Holland Hospitality, Inc* 85 F3d 1211 (6th Cir 1996) [$50,000.00 award to unwed mother who was terminated for contemplating having an abortion].

6. PLAINTIFF IS ENTITLED TO REMAND TO THE CIRCUIT COURT FOR THE INCLUSION OF APPELLATE ATTORNEY FEES.

In the instant case the Final Judgment signed by Judge Battani retained jurisdiction to assess reasonable costs and attorney fees. [42a-43a] Plaintiff, by stipulation, agreed to attorney fees through October1998. Plaintiff is now requesting that after this Court's decision, that this case be remanded for the award of appellate attorney fees and all appellant work done to date.

The Elliott-Larsen Civil Rights Act does permit the award of appellate attorney fees. *McLemore v Detroit Receiving Hospital & University Medical Center*, 196 Mich App 391, 493 NW2d 441 (1992). Also See, Michigan Wrongful Discharge and Employment Discrimination Law, 2d, Ruga, Przybylowicz & Kopka, §4.30 p. 4-36.

RELIEF REQUESTED

WHEREFORE, for all of the aforementioned reasons, Plaintiff-Appellee respectfully requests that the Court deny Defendant'a Appeal and Remand this case for the inclusion of appellate attorney fees pursuant to the Elliott-Larsen Civil Rights Act.

Respectfully Submitted,

HURLBURT, TSIROS, ALLWEIL & PEREZ P. C.

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